Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1998

WILLIAM A. FICKLING, JR., *et al.*

Petitioners,

v.

ALEXIS M. HERMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal government agencies are bound by ordinary principles of representative claim preclusion when those agencies seek monetary relief on behalf of private persons who previously litigated the identical claims to final judgment.

2. Whether the Secretary of Labor may obtain equitable relief against nonfiduciaries who allegedly benefitted from a fiduciary's violation of Title I of ERISA.

PARTIES TO THE PROCEEDINGS

The following persons or entities were parties to the proceedings in the court of appeals:

Bank South, Macon, as Trustee under Agreement of William A. Fickling, Jr., Self-Employed Retirement Plan.
Charter Medical Corporation
Charter Medical Corporation Employee Stock Ownership Plan and its participants and beneficiaries
NationsBank of Georgia, N.A., successor to Citizens & Southern Trust Co. (Georgia), N.A., as trustee under certain Fickling private family trusts
James Daher
Claudia F. Fickling
Jane Dru Fickling
Julia C. Fickling
Neva L. Fickling
Roy H. Fickling
William A. Fickling, Jr.
William A. Fickling, III
Alexis Herman, Secretary of Labor
Frances J. Knop
J. Rodney Laughlin
William F. Monfort, Jr.
Virginia M. Rabun
Jane F. Skinner
Millie Smith
South Carolina National Bank
Stanley S. Trotman
W&J Capital Company, Ltd.
Wachovia Bank of South Carolina, N.A.
Katherine Darden Wright
Katherine M. Wright

RULE 29.6 STATEMENT

NationsBank of Georgia, N.A., (as successor to Bank South, Macon, and Citizens of Southern Trust Company (Georgia), N.A.) is a party solely in its capacity as trustee for several private Fickling family trusts. Those private trusts have now been dissolved.

J&R Capital Co., Ltd. and W&J Capital Co., Ltd. are defunct Georgia limited partnerships. They have no parent company or any nonwholly owned subsidiaries.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William A. Fickling, Jr., Neva L. Fickling, William A. Fickling III, Jane F. Skinner, Julia C. Fickling, Roy H. Fickling, Claudia F. Fickling, Jane Dru Fickling, Katherine M. Wright, Katherine Darden Wright, Virginia M. Rabun, W&J Capital Company, Ltd., J&R Capital Company, Ltd., and NationsBank of Georgia, N.A., as successor trustee under certain Fickling private trusts, respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 140 F.3d 1413. The district court order approving the settlement in the earlier class action that raised the same claims (App., *infra*, 51a-58a), and the court's orders rejecting the Secretary of Labor's attempt to relitigate those claims (*id.* at 41a-50a) and ruling that nonfiduciaries are not, in any event, liable under ERISA (*id.* at 35a-37a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998. Timely petitions for rehearing were denied on August 10, 1998. App., *infra*, 31a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The pertinent provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975, and Rule 23 of the Federal Rules of Civil Procedure, are reproduced at App., *infra*, 62a-107a.

STATEMENT OF THE CASE

1. Charter Medical Corporation ("Charter") created an Employee Stock Ownership Plan ("ESOP" or "Plan") in 1988.[1] At that time, the ESOP acquired more than 10 million Charter shares. In February 1990, the ESOP purchased an additional 1.8 million Charter shares from petitioners. Each purchase of Charter stock was preceded by a determination by South Carolina National Bank ("SCNB"), as trustee of the ESOP, that the transaction met the requirements of ERISA.

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[1] An ESOP is an ERISA-covered pension plan that invests primarily in the employer's stock. *See* 29 U.S.C. § 1107(d)(6)(A).

To that end, SCNB in each case obtained from an established investment banking firm an independent appraisal of the stock to be acquired. The ESOP borrowed from Charter the $375 million necessary to consummate the 1988 purchase and the $80 million paid in connection with the 1990 acquisition. App., *infra*, 3a, 4a.

Beginning in the Spring of 1990, Charter, like most other companies in the psychiatric hospital business, experienced a substantial loss of operating income. Charter's income deteriorated throughout 1990, and eventually Charter filed for reorganization under Chapter 11 of the Bankruptcy Code.

2. In May 1991, two participants in the Charter ESOP commenced a class action against, *inter alios*, SCNB and several petitioners in the United States District Court for the Northern District of Alabama. *See Knop v. Charter Med. Corp. et al.*, No. 91-CV-1075 ("*Knop* action"). Among other things, the class action complaint alleged that the 1988 and 1990 ESOP transactions violated ERISA. As required by Section 502(h) of ERISA, 29 U.S.C. § 1132(h), the complaint was served on the Secretary of Labor, who thereupon acquired the right to "intervene in [the] action." *Ibid.* The Secretary elected not to intervene.

Nonetheless, the Secretary was kept informed on the course of proceedings by counsel for the parties in *Knop*. As part of that involvement, the Secretary let it be known that a proposed settlement that was initially considered by the parties was in her view inadequate. The parties then substantially sweetened the terms of the proposed settlement—and heard no further dissent from the Secretary.[2] On March 27, 1992, the parties in *Knop* signed a settlement agreement that incorporated those sweetened terms. App., *infra*, 4a, 42a, 52a. On the same day, the court certified a class that in-

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[2] *See* 7 Court of Appeals Record ("C.A. Record"), Docket Entry 146 (¶¶ 13-14 & Exh. E); 6 C.A. Record, Docket Entry 141 (Apps. 2 & 3).

cluded all ESOP participants, and gave preliminary approval (subject to the outcome of a subsequent "fairness" hearing) to the settlement. *Id.* at 42a. That settlement substantially benefitted the ESOP and its participants.[3] For their part, the class action plaintiffs agreed to release the defendants and all affiliated and related entities and persons (including all petitioners) from all claims arising from both the 1988 and 1990 transactions.

The Secretary received a copy of the March 27 settlement agreement shortly after the entry of the district court's order preliminarily approving the settlement and authorizing notice to the class. App., *infra,* 42a-43a, 60a. In response, the Secretary sent a letter, dated April 9, 1992, to counsel for all the parties in *Knop*, stating that while she did not consider herself bound by the settlement, she did "not wish to make the chances of settling the *Knop Action* any less likely." *Id.* at 60a. The Secretary did not appear at the April 30, 1992 fairness hearing concerning the settlement. The settlement was approved following that hearing. *Id.* at 42a-43a.

3. On June 19, 1992, more than six weeks after the *Knop* action had been dismissed with prejudice, the Secretary sent a letter to the attorneys for the *Knop* defendants demanding relief for the same 1990 transaction that had been at issue in the *Knop* litigation. Among other things, the Secretary sought rescission of the 1990 transaction. App., *infra*, 43a.

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[3] The settlement provided for $30 million in loan forgiveness of the $70 million debt owed by the ESOP on the 1990 loan; $40 million in accelerated contributions by Charter to the ESOP (to be used to pay off the 1990 loan balance); and $12.3 million in payments to a new pension plan to be established by Charter. App., *infra*, 43a. Because petitioners, as preferred stockholders, held priority rights over common stockholders like the ESOP, the settlement also required petitioners to surrender their priority rights and to consent to a less favorable allocation of Charter's common stock. *Id.* at 5a, n.4.

The rescission remedy demanded in the Secretary's letter was wholly incompatible with the settlement approved in the district court's final judgment in *Knop*, which expressly contemplated that the ESOP would *retain* its Charter shares and made provision for payment of the outstanding debt. Accordingly, in July 1992, SCNB sought from the *Knop* court a declaration that, to the extent the Secretary sought to recover money for the benefit of the plan and its participants, she was bound by the judgment entered on the identical claims in the *Knop* case, in which those participants likewise had sued on behalf of the plan. Before the *Knop* court could act on SCNB's request for relief, however, the Secretary filed a *new* suit against petitioners in a different federal district court (the Middle District of Georgia), making the same allegations and asking for the same relief as outlined in her June 19, 1992 letter. The Secretary's Georgia complaint was transferred to the federal court that had heard the *Knop* action in Alabama pursuant to 28 U.S.C. § 1404(a), and was there consolidated with the actions brought by SCNB. App., *infra,* 5a-7a, 43a-44a, 50a.

The Secretary's complaint, as amended following consolidation, alleged that SCNB had breached its fiduciary duties under ERISA § 404(a), 29 U.S.C. 1104(a), and caused the ESOP to engage in a prohibited transaction under ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A), by purchasing Charter stock from petitioners in 1990 for more than adequate consideration. With respect to petitioners, the Secretary alleged that they were each "parties in interest" who participated in "a prohibited transaction" with SCNB when they sold Charter stock to the ESOP in 1990. App., *infra,* 3a-4a, 7a-8a, 44a.

4. The district court granted summary judgment in favor of petitioners and SCNB. Relying on *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), a case holding that nonfiduciaries cannot be sued under ERISA for knowingly participating in breaches of fiduciary duty, the court first concluded that ERISA similarly does not authorize the Secretary to sue nonfiduciary "parties in interest" for their participation, knowing

or otherwise, in a prohibited transaction. App., *infra*, 36a-37a.

The court subsequently concluded that the Secretary's monetary claims are barred by res judicata. The court noted the Secretary's concessions that she "received all of the information and documents upon which [her] present claims are based long before the * * * fairness hearing," that an expert hired by the Secretary had advised her of the alleged deficiencies in the settlement "more than a month before that hearing," and that "for two full years [the Secretary] had * * * reviewed and been given the opportunity to review and copy every contemporaneous document referrable to the 1990 transaction." App., *infra*, 45a-46a. Nonetheless, the court noted, "the Secretary chose not to appear at the * * * hearing nor to advise the parties or this court of [her] opinion that additional monetary relief for the class action plaintiffs was warranted." *Ibid.* "[B]ased in no small part on the reticence of the Secretary to express any substantive dissatisfaction with the settlement," the district court emphasized, "this court approved the settlement agreement." *Id.* at 46a.[4]

The district court also explained that in these circumstances "all four requirements" of the doctrine of res judicata are met, because the Secretary's action seeks to revisit (i) a final judgment, (ii) rendered by a court of competent jurisdiction, (iii) with respect to the same cause of action, where (iv) "there is substantial identity of the parties." App., *infra*, 46a-47a. In particular, the court noted that the Secretary's suit sought relief on behalf of the plan, and that therefore the Secretary is a "representative * * * only." *Id.* at 47a. Because the plan participants had already sued and recovered on behalf of the plan in the *Knop* action, the court concluded that the Secretary was barred from bringing a new representative suit to recover additional money for the plan. Quoting from this Court's opinion in *Chicago, Rock Island & Pac. Ry.*

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[4] The court also held that the Secretary's monetary claims were barred by the doctrine of laches. App., *infra*, 46a-47a.

Co. v. Schendel, 270 U.S. 611, 619 (1926), the court observed that "the government 'ought not be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudication.'" App., *infra*, 47a-48a.[5]

5. The court of appeals reversed. App., *infra*, 1a-30a. The Eleventh Circuit rejected petitioners' contention that the Secretary's suit, to the extent it seeks monetary relief on behalf of the plan and its participants, is barred by the earlier dismissal with prejudice of the class action brought by the plan participants on their own behalf and for the plan's benefit. In so doing, the court relied on what it believed to be the "well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." App., *infra*, 22a-23a (citing voting rights and antitrust cases from this Court).

In applying that purportedly "well-established general principle," the Eleventh Circuit nonetheless acknowledged "EEOC cases from other circuits that preclude the EEOC from recovering monetary relief for private individuals who have already settled in their own name." *Id.* at 24a-25a, n.22. Its own EEOC precedents, the court believed, pointed in the opposite direction, and were, therefore, consistent with the "general principle" announced by the court. *Ibid.* (citing *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990)). The court also believed that the wisdom of

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[5] The court was careful to note that "different considerations might normally apply to the Secretary's claims for appropriate *equitable* relief," because such relief "can serve to vindicate a broader public interest in preventing violations of the law." App. *infra*, 47a-48a, n.1. SCNB and the Secretary later settled the Secretary's claims for injunctive relief, and the district court entered a consent order that enjoined SCNB from acting as a fiduciary or service provider for the Charter ESOP and barred it from acting as a trustee for any other ESOP for three years. *Id.* at 7a & n.7.

that "general principle" was demonstrated by the purported inadequacy of the *Knop* settlement, which "recovered from Charter only a small fraction of the Plan's $80 million in assets lost in the stock purchase." App, *infra*, 24a. "The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery * * *." App., *infra*, 26a.[6]

The Eleventh Circuit also concluded that petitioners can be held liable under ERISA if they are found to be "parties in interest." The court reasoned that Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), permits the Secretary to obtain "appropriate equitable relief * * * to redress [a] violation" of ERISA, and that Section 406 of ERISA, 29 U.S.C. § 1106, in turn, forbids a *fiduciary* (such as SCNB) to "cause the plan to engage" in certain transactions with "parties in interest." Even though petitioners were *not* fiduciaries, the court held that, as parties in interest, petitioners could be found to "violate[] ERISA by engaging in transactions * * * prohibited by [Section] 406." App., *infra*, 8a-9a, 14a. Accordingly, in the court's view, it is appropriate to invoke Section 502(a)(5) (and the parallel provision that permits private litigation, Section 502(a)(3), 29 U.S.C. § 1132(a)(3)) to "redress" that purported violation by imposing liability on the party in interest. App., *infra*, 16a-17a.

The court acknowledged that in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court stated that nonfiduciaries may not be sued under ERISA even for *knowingly* participating in a fiduciary's breach of duty. But the court arrived at the opposite conclusion here, relying on a footnote in *Mertens* in which this Court referred in passing to Section

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[6] As a corollary to its conclusion that government agencies always represent a separate "public" interest in litigation, the Eleventh Circuit ruled that the Secretary of Labor is never barred by laches. App., *infra*, 27a-29a (citing, *inter alia*, *United States v. Summerlin*, 310 U.S. 414, 416 (1940)).

406 as a provision that "can be read" to impose obligations on nonfiduciaries. App., *infra,* 16a-17a.

REASONS FOR GRANTING THE WRIT

This case presents two questions of exceptional importance to the administration of justice in the lower federal courts. The first question is whether the court of appeals correctly concluded that there is "a well-established general principle" that the government is not bound by ordinary principles of res judicata whenever "the *statute*" under which the government proceeds "implicates both public and private interests." App., *infra*, 22a-23a. The Secretary concedes that any money she recovers in this case would be paid over to the ESOP and ultimately to the participants and beneficiaries of that plan—the same participants and beneficiaries whose identical claims for monetary relief were resolved by the judgment entered in *Knop*. This Court's cases make clear that where, as here, the government brings suit to obtain pecuniary relief for another party, any judgment entered on the same claims in earlier litigation brought by that party binds the government under the doctrine of representative claim preclusion. Indeed, as shown by the "cases from other circuits" (App., *infra*, 25a, n.22) that the Eleventh Circuit refused to follow here, those other circuits understand that government agencies are fully subject to ordinary principles of res judicata, even when they administer statutes, such as those dealing with racial discrimination, that "implicate[] both public and private interests." *Id.* at 22a-23a. This Court's intervention is necessary to restore uniformity to this important area of federal law.

The Court's intervention is also essential to give an authoritative answer to the second question presented by the petition: whether the Secretary may proceed against nonfiduciary parties in interest who allegedly participated in a prohibited transaction. Several courts of appeals have read this Court's decision in *Mertens* as rejecting liability for nonfiduciaries under Sections 502(a)(3) & (a)(5) of ERISA, 29 U.S.C. § 1132(a)(3), 29 U.S.C. § 1132(a)(5), even when

those nonfiduciaries *knowingly* participate in a fiduciary's breach of trust. *See, e.g., Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (Posner, J.). Other courts of appeals, like the court below, have read *Mertens* as excepting statutory "parties in interest" from the general principle that nonfiduciaries are not liable under Sections 502(a)(3) & (a)(5). App., *infra*, 14a-17a.[7] Most recently, another court of appeals concluded that nonfiduciaries *are* liable under those provisions if they knowingly participate in a fiduciary's breach, *whether or not* they are "parties in interest." *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998). The increasing disarray in the lower courts' approach to the liability of nonfiduciaries under Section 502(a) of ERISA plainly warrants this Court's plenary review.

I. Government Agencies, Like Private Parties, Are Bound By the Doctrine of Representative Claim Preclusion

1. This Court has long adhered to the basic rule that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). That rule reflects "[a] fundamental precept of common-law adjudication," *Montana v. United States*, 440 U.S. 147, 153 (1979), founded on the strong "[p]ublic policy [that] dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result * * *." *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). Application of res judicata principles avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility

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[7] *Reich v. Stangl*, 73 F.3d 1027, 1030-31 (10th Cir.), *cert. denied*, 117 S. Ct. 48 (1996); *Landwehr v. DuPree*, 72 F.3d 726, 734-35 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285-87 (3d Cir. 1995); *see also Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994) (dictum).

of inconsistent decisions." *Montana*, 440 U.S. at 153-54. Indeed, adherence to the doctrine of res judicata is "demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order." *Southern Pac. R.R. v. United States*, 168 U.S. 1, 49 (1897).

As is also reflected in this Court's cases, the res judicata effect of a judgment extends not only to the parties named in the judgment but also to those "in privity" with them. *See Nevada v. United States*, 463 U.S. 110, 134-35 (1983) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)); RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982). Although a wide variety of circumstances may demonstrate privity, this Court has consistently ruled that privity exists when one party represents the interests of another litigant. *See, e.g., Nevada*, 463 U.S. at 135 (Indian tribe bound by government's representation of its interests in earlier action); *id.* at 137-38, 145 (irrigation district bound by government's representation of its interests in earlier action); *Kersh Lake Drainage Dist. v. Johnson*, 309 U.S. 485, 491 (1940) (bondholders are bound by litigation "wherein an indenture trustee under a bond issue is a party"); *Kerrison v. Stewart*, 93 U.S. 155, 160 (1876) ("the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion"). As this Court recently noted, representative actions—wherein one party sues on behalf of another—are one the most common examples of "privity." *Richards v. Jefferson County*, 517 U.S. 793, 798-99 (1996) (noting that, "[f]or example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of the trust").

No different rule applies merely because the representative party is an agency of the federal government. In *Heckman v. United States*, 224 U.S. 413 (1912), for example, this Court held that where the government sues on behalf of Indians to set aside illegal land conveyances "the decree will bind

not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation." *Id.* at 445-46. Fourteen years later, the Court adverted to and reaffirmed its holding in *Heckman*, noting approvingly that the principle applies with the same force to preclude a representative suit by the government after the real party in interest has already sued to vindicate his own rights:

> And, conversely, in *United States v. Des Moines Valley R. Co.*, 84 F. 40, * * * where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government.

Chicago, Rock Island & Pac. Ry. v. Schendel, 270 U.S. 611, 619 (1926). Quoting extensively from *Des Moines Valley*, this Court in *Schendel* also noted that the government would be bound whether it sued under a specific statute dealing with the problem or "in pursuance of its general right to sue." *Id.* at 619. The pertinent question is not whether the government is invoking a particular statute, but whether there has been a "previous adjudication[] against the real party in interest." *Ibid.* If so, "the government should be held estopped." *Ibid.*

Those principles clearly control this case. In seeking monetary relief that would directly benefit the participants and beneficiaries of the ESOP, the Secretary unquestionably is acting as the representative of the same ERISA plan in whose behalf the *Knop* plaintiffs already have sued, and whose claims have already been resolved in a final judgment rendered by a court of competent jurisdiction. Thus, for example, the Secretary's complaint specifically requests restitution to the ESOP. *See* Secretary of Labor's Complaint, Prayer for Relief ¶ 3. And, as the Secretary conceded below, she "is acting on behalf and in the interests of the plan participants and beneficiaries," 7 C.A. Record, Docket Entry 142-20 (App. F at. 1), because "the monetary relief would go to [the *Knop*] plaintiffs." *Ibid.* Indeed, the Secretary even concedes that her prayer for relief must be "offset by sums

already recovered" by the plan in the *Knop* litigation. App., *infra*, 6a. It is difficult to imagine a clearer concession that the Secretary is pursuing the same claims that were already litigated by the real party in interest; if the Secretary were pursuing an independent action for the benefit of the public, no issue of "crediting" the earlier private judgment to the Secretary's potential recovery would arise. This case, therefore, is governed by the general rule that "[a] nonparty whose interests have once been represented is not free to relitigate the same interests either in person or through another representative." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4454 at 462 (1981).

2. The decision below conflicts with numerous decisions from other circuits that have heeded this Court's teachings. Those circuits do *not* agree with the Eleventh Circuit's view that there is a "general principle" that the government "is not bound" by ordinary principles of claim preclusion when it sues under a "statute that implicates both public and private interests." App., *infra*, 22a-23a.

For example, in *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), the EEOC brought suit under Title VII on behalf of an employee whose own case against the defendant employer had been dismissed with prejudice. *Id.* at 454. Although holding that the dismissal of the employee's suit did not cut off the EEOC's right to *enjoin* any discriminatory practices of the defendant, the court concluded that "the EEOC would be barred from filing suit . . . on behalf of [a] person who had had his suit adjudicated. Res judicata would prevent such a suit." *Id.* at 456.[8] The reason for that conclusion is straightforward. As the Seventh Circuit ex-

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[8] *See also Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980) ("[T]he E.E.O.C. may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the E.E.O.C. seeks relief different from that sought by the individual").

plained in *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993), "there is privity between the EEOC and individuals for whom it seeks individual benefits."

Numerous decisions of other courts of appeals are to the same effect, and bar claims by the government for monetary relief (including equitable relief such as backpay) on behalf of individuals who have already resolved their claims. *See, e.g., EEOC v. United States Steel Corp.*, 921 F.2d 489, 493, 496 (3d Cir. 1990); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987). As the Second Circuit recently explained, "[w]hile recognizing that the EEOC's right of action is separate from the employee's, circuit courts have uniformly held that the EEOC may not seek monetary relief in the name of an employee who has waived, settled, or previously litigated the claim." *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 301 (2d Cir. 1998). The lower courts also recognize that, unlike monetary relief, injunction actions ordinarily may go forward notwithstanding earlier litigation, since injunctions "seek[] to vindicate rights belonging to the United States as sovereign." *Id.* at 302.[9]

Although many of the reported cases involve the EEOC, the lower courts have also held that a prior private lawsuit bars a subsequent governmental action seeking relief for the private plaintiffs in proceedings under the National Labor Relations Act, *e.g., NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 37-38 (1st Cir. 1987), and in cases brought by the Federal Deposit Insurance Corporation, *see In re Imperial Corp. of America*, 92 F.3d 1503, 1509 (9th Cir. 1996), and by the Federal Trade Commission, *FTC v. AMREP Corp.*, 705 F. Supp. 119, 124 (S.D.N.Y. 1988); *see also In re Schimmels*,

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[9] *See also New Orleans S.S. Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010-11 (6th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975).

127 F.3d 875, 881-84 (9th Cir. 1997) (government is bound by prior adjudication against relators in *qui tam* action).[10]

Unlike the Eleventh Circuit in this case, those courts have squarely rejected the proposition that a government agency can avoid ordinary principles of claim preclusion merely by reciting that the *statute* that it seeks to enforce implicates public policy interests. In *U.S. Steel Corp.*, for example, the agency made precisely that argument; it contended that claim preclusion was inappropriate because the agency had "'a broader independent public interest different from that of an individual grievant.'" 921 F.2d at 496 (quoting agency's

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[10] While the Eleventh Circuit made clear its disagreement with the "cases from other circuits" on which petitioners relied, it also suggested in passing that those cases might be inapposite because they arose under "the different statutory enforcement schemes of Title VII of the ADEA." App., *infra*, 25a, n.22. As demonstrated by cases such as *Donna-Lee Sportswear*, *Imperial Corp*, and *AM-REP Corp.*, the rule of representative claim preclusion is not limited to cases brought by the EEOC, but extends to all cases in which government seeks monetary relief on behalf of private parties.

Nor is there merit to the Eleventh Circuit's suggestion that the EEOC cases can be distinguished on the theory that the Age Discrimination in Employment Act expressly precludes private actions once the the EEOC brings suit. There is *no* similar language in Title VII—yet the courts have applied the same preclusion principles in Title VII cases as under the ADEA. *See, e.g., Huttig Sash & Door*, 511 F.2d at 455-566; *see also Goodyear Aerospace*, 813 F.2d at 1543. Indeed, the ADEA language cited by the panel precludes only *private* suits, not suits *by the agency*. The lower courts have nonetheless applied res judicata to bar *the agency* from obtaining monetary relief on behalf of settled plaintiffs. As the Third Circuit pointed out in this exact regard, while the ADEA does not expressly provide for claim preclusion against the EEOC, "[t]he underlying policy of res judicata * * * applies with no less force in those instances in which the individual has actually litigated on his own behalf * * *." *United States Steel Corp.*, 921 F.2d at 495.

brief). The Third Circuit rebuffed that contention, because it was focused on the statute as a whole, rather than on the specific claims that the agency sought to advance in the litigation:

> The Commission's description of its enforcement role under the [statute] is accurate and important, but this description fails to distinguish between the EEOC's role in protecting the public interest and its role in vindicating specific private claims. * * * [W]hen the Commission seeks individualized benefits under the [statute] for particular grievants * * * the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.

Ibid. Thus, while the government remains free to seek relief aimed exclusively at vindicating broad-based public interests (*e.g.*, injunctions, declaratory remedies, etc.), *see Harris Chernin*, 10 F.3d at 1291, it may not bring suit, as the Secretary has done here, seeking further monetary relief on behalf of the very private parties who have resolved their claims against petitioners.[11]

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[11] That important distinction explains why the Eleventh Circuit was wrong to believe that its rejection of claim preclusion principles was supported by *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), and *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc). Each of those cases recognized, like the Third Circuit did in *U.S. Steel Corp.*, that the *statute* at issue is intended to safeguard important public interests. But, like the Third Circuit in *U.S. Steel*, each of those cases also recognized that those public interests would warrant an independent action by the agency only to the extent that such an action sought relief *other* than an award of money to a particular grievant who had already compromised his own claims. *Cunningham*, 716 F.2d at 1462-63 & n.10 (noting Secretary's "public" interest in preventing "loss to any future ERISA plan participant," and citing EEOC res judicata cases for the proposition that the prior private settlement would affect "the scope of relief" available to the Secretary on remand); *Fitzsimmons*, 805 F.2d at 696-97 (emphasizing the Secre-

3. The Eleventh Circuit's "general principle" that government agencies are "not bound" by ordinary principles of representative claim preclusion finds no support in the three cases from this Court on which the Eleventh Circuit relied. Neither is that novel doctrine supported by the Eleventh Circuit's wholesale acceptance of the Secretary's bare allegation that the *Knop* litigation was compromised too cheaply.

First, the Eleventh Circuit plainly departed from this Court's cases by accepting the purported inadequacy of the *Knop* recovery as a reason for refusing to apply ordinary principles of claim preclusion. App., *infra*, 24a-26a. The settled common-law rule is that res judicata applies with equal force "whether the [earlier] decision be right or wrong." *Reed v. Allen*, 286 U.S. 191, 201 (1932). As this Court has explained, "an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata;*'" such purported errors "can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." *Federated Department Stores v. Moitie*, 452 U.S. at 398 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) (brackets added by the Court in *Moitie*)).

Nor can application of res judicata be evaded simply by positing that the party who brings a second lawsuit will be required to credit the amount already recovered against any eventual second judgment. App., *infra*, 6a. The preclusive effect of judgments is not a one-way process in which only

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tary's request for injunctive relief to avoid *future* harm to ERISA plans). Indeed, with respect to monetary relief, the actual holding in *Fitzsimmons* was that the Secretary's case would be *dismissed* unless the Secretary—who had *intervened* in the private litigation in order to challenge the fairness of the settlement of the plan participants' individual claims—presented "convincing evidence" that the settlement was indeed inadequate (*id.* at 699).

the defendant is bound. By the same token, federal judgments are not ordinarily litigated on the installment plan, so that a plaintiff is permitted to bring and compromise a claim only to then cede his place to his privies, who can thereupon begin the second step of a multiple-step recovery. "A final judgment entered by a court of [competent] jurisdiction establishes not only the measure of the plaintiff's rights *but also the limits of the defendant's liability*. A traditional application of res judicata principles enables *either party* to claim the benefit of the judgment insofar as it resolved issues that the court had jurisdiction to decide." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 282 (1980) (plurality opinion of Stevens, J.) (emphasis added).

Second, the three cases from this Court on which the Eleventh Circuit relied do not support the proposition that government agencies are exempt from ordinary principles of representative claim preclusion. Two of those cases hold only that the United States is not bound by private litigation of the question whether a particular change in state election procedure is subject to the "preclearance" requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See Hathorn v. Lovorn*, 457 U.S. 269 n.23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373-74 n.6 (1975). Wholly absent from either of those cases is any suggestion that the government was seeking any *monetary* relief, much less monetary relief for the benefit of particular voters.[12] In the third case, *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961), this Court concluded that private parties were not entitled to intervene in an antitrust action brought by the government, seeking declaratory and injunctive relief, because those private parties would not be bound by the ultimate

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[12] The Attorney General's preclearance authority under the Voting Rights Act does not extend to monetary relief. It more closely resembles the type of declaratory or injunctive claims that concededly seek to vindicate broad-based public interests.

judgment in the government's injunctive suit.[13] Like *Lovorn* and *City of Richmond*, *Sam Fox* did *not* involve any issue of representative claim preclusion—*i.e.*, government litigation that concededly "seeks individualized benefits * * * for particular grievants." *U.S. Steel Corp.*, 921 F.2d at 496. Those cases therefore afford no basis for the Eleventh Circuit's sweeping decision exempting all government litigation from basic principles of representative claim preclusion.

4. The Eleventh Circuit's refusal to apply settled principles of claim preclusion to representative litigation by federal agencies is particularly indefensible where, as here, the earlier judgment *also* was a representative suit brought as a class action in federal court. Class action procedures serve substantial governmental interests in the expeditious and fair resolution of legal disputes and in the efficient use of the court system. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 & n.11 (1981); *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Not surprisingly, far from exempting class action judgments from "elementary principles of prior adjudication,'" *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 (1996) (quoting *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984)), our legal system recognizes judgments rendered in a "'properly entertained class action'" as reliable and binding "in any subsequent litigation." *Ibid.*

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[13] In *Sam Fox*, the government had originally sought declaratory and injunctive relief in 1941. When the government later sought a modification of the consent decree that resulted from that litigation, several parties moved to intervene on the theory that they might be foreclosed from pursuing their independent claims by the proposed modification of the consent decree. The motion was denied because the putative intervenors' fear of estoppel was unfounded. As this Court put it, "a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation." 366 U.S. at 689.

The Eleventh Circuit's dismissive treatment of the *Knop* judgment notwithstanding, class action rules embody numerous procedural safeguards that are designed specifically to ensure against the erroneous determination of a controversy. Those include not only the basic requirement of a truly representative plaintiff, *see, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. at 378-79, but also careful judicial determinations as to the commonality of class members' interests, the typicality of their claims, and, when necessary, the fairness of any settlement. *See, e.g.*, Fed. R. Civ. P. 23(a)-(b), (e); *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248-51 (1997). When those protections are observed, as they concededly were in *Knop*, this Court has long recognized that "there can be little danger but that the interest of all will be properly protected and maintained." *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854).

Of particular relevance here, those rules expressly provide that no class action may be compromised "without the approval of the court," and that a court may give such approval only after notice has been "given to all members of the class." Fed. R. Civ. P. 23(e). Rule 23(e) thus contemplates a "fairness hearing" in which class members and "all interested parties have an opportunity to be heard. The goal of the hearing is to adduce all information necessary for the judge to rule intelligently on whether the proposed settlement is fair, reasonable, and adequate." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (quoting Manual for Complex Litigation § 1.46, at 57 (West 1981) (internal quotations omitted)). That "fairness hearing" is also the time and place for assessing "the broader implications of a class action settlement" for any "important national policies" that may be reflected in the legislation creating the cause of action. *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980); *see also Woodall v. Drake Hotel, Inc.*, 913 F.2d 447, 451 (7th Cir. 1990). In that way, the rules protect the public interest as well as "'the nonparty members of the class from unjust or unfair settlements affecting their rights.'" *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 818 (5th Cir. 1989)

(quoting *Piambino v. Bailey*, 610 F.2d 1306, 1327 (5th Cir. 1980)).

The Secretary willfully avoided that established procedure for airing any concerns she may have had about the fairness of the proposed *Knop* settlement. Not only did she fail to advise the *Knop* court of her views (or even seek additional time to present those views), but she also absented herself altogether from the April 30 fairness hearing, which the district court described as crucial to its responsibility to ensure that the appropriateness of that settlement. That decision to skip the fairness hearing, after affirmatively suggesting that she did not want to impede approval of the settlement, would be reprehensible if made by any private litigant. That behavior is inexcusable on the part of a public officer like the Secretary, who had an even higher duty to apprise the court that she would be filing a new suit—using additional scarce judicial resources—for the sole purpose of attacking the court's judgment collaterally; a new suit that the Secretary in fact filed before the ink on that judgment had a chance to dry. Class action rules serve compelling public interests, and they are designed to adjudicate each claim once and for all time. No principle heretofore recognized by this Court permits the government to deprive those rules of their social value by ignoring them at will.

5. The Eleventh Circuit's decision not only conflicts with decisions of this Court and other circuits, but, if allowed to stand, it will have drastic consequences for the sound administration of justice by rendering settlement of private ERISA cases unlikely. Settlements are strongly favored in the law. *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). Yet, under the Eleventh Circuit's decision, defendants will be well advised to avoid settlement unless the Secretary formally participates in the discussions and officially signs the settlement agreement; the decision below leaves no other practical way to guarantee finality. And when cases brought by participants and beneficiaries do settle, ERISA plans will obtain *lower* recoveries, because those plaintiffs cannot deliver what defen-

dants value most—peace and repose. Any rational defendant will always be willing to pay out *more* to the plaintiff *if* he is assured that he is thereby purchasing certain and final resolution of the claims against him. That assurance, which heretofore has been delivered by the well settled res judicata effect of class actions, has utterly vanished in the wake of the decision below. "Given the pervasive significance of pension plans in the national economy," the questions raised by the Eleventh Circuit's refusal to accord preclusive effect to ERISA class actions are "of undoubted importance," *Boggs v. Boggs*, 117 S. Ct. 1754, 1758 (1997), and plainly warrant this Court's plenary attention.

II. ERISA's Carefully Integrated Enforcement Provisions Do Not Authorize Equitable Relief Against Nonfiduciary Parties In Interest.

1. This Court held in *Mertens* that Section 502(a)(3) of ERISA, the private party analog to the provision invoked by the Secretary here, authorizes equitable relief only, and, accordingly, precludes purely legal remedies, such as money damages. 508 U.S. at 256-59. Because the plaintiffs in *Mertens* had sued a *non*fiduciary for allegedly participating in the plan fiduciary's breach of trust, this Court (en route to its main conclusion) also had occasion to point out that "no provision of [of ERISA] explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* at 254. That omission, the Court was also careful to note, can only be considered a deliberate policy choice, given that (1) Congress was aware that the common law of trusts held nonfiduciaries liable for "knowing participation" in such breaches, and (2) Congress nonetheless chose to impose "knowing participation" liability only on parties who qualify as "co-fiduciaries" under ERISA. Thus, as the Court later explained, "[w]hile plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable duty [is] set forth in ERISA." *Central Bank v. First Interstate Bank*, 511

U.S. 164, 175 (1994) (internal citations to *Mertens* omitted; emphasis in original).

In light of the careful consideration that *Mertens* gave to the issue of nonfiduciary liability, several lower courts initially rejected the Secretary's attempts to nullify that aspect of *Mertens*. For example, in *Reich v. Continental Cas. Co.*, 33 F.3d at 757, the Seventh Circuit explained that "the majority opinion [in *Mertens*] goes out of its way to throw cold water on the idea of an implied liability of nonfiduciaries for knowing participation in fiduciaries' misconduct," and concluded that since this Court "consider[ed] all the relevant considerations and adumbrat[ed] an unmistakable conclusion, it would be reckless [for lower courts] to think the Court likely to adopt a contrary view in the near future." This Court later rebuffed the Secretary's certiorari petition, which argued that the Secretary should be permitted to seek equitable relief from nonfiduciaries under Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). *See Reich v. Continental Cas. Co.*, 513 U.S. 1152 (1995); Petition for a Writ of Certiorari, *Reich v. Continental Cas. Co.*, No. 94-1094 (Dec. 1994).

Since then, however, the Secretary's fortunes have turned, at least in the lower courts. Thus, for example, the Secretary has persuaded several courts of appeals—including the Eleventh Circuit in this case—to recognize an exception to *Mertens* in cases where the nonfiduciary is a statutory "party in interest" who takes part in a "prohibited transaction." And, most recently, the Secretary succeeded in persuading the Fourth Circuit to expand that exception into a rule that *all* nonfiduciaries, *whether or not* they are "parties in interest," may be held liable under Section 502(a)(3) for participating in a "prohibited transaction." *See LeBlanc* 153 F.3d at 153 ("The distinction [between 'parties in interest' and other nonfiduciaries] is without a difference").

As she had done with three other circuits, the Secretary in this case persuaded the Eleventh Circuit of her authority to seek relief from nonfiduciary "parties in interest" on the strength of a single remark in *Mertens*: that the party-in-interest provisions of ERISA "can be read" to impose

"obligations" on nonfiduciaries. *Mertens*, 508 U.S. at 253-54. Three Terms ago, this Court adverted to the Secretary's theory of nonfiduciary party-in-interest liability, and (aside from noting that it was based on mere "dicta" from *Mertens*) could find nothing more favorable to say about it than to note that it "is not necessarily wrong." *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996). While the passage of time has not boosted the persuasiveness of the Secretary's position above that level of faint praise, it has aggravated the lower courts' confusion about the scope of the Secretary's ability to obtain equitable relief from parties who, like petitioners, are *not* fiduciaries. This Court's intervention is urgently needed to reaffirm *Mertens*' basic teaching that the Secretary of Labor may not obtain relief from nonfiduciaries.

2. The Secretary's position is contrary to the text and structure of ERISA. As the Solicitor General conceded in his amicus curiae brief before this Court in *Spink*, Title I of ERISA, from which the Secretary purports to derive her authority to sue nonfiduciary "parties in interest," does not speak "to the lawfulness of *transactions*, but rather to the lawfulness *of fiduciary conduct*." Brief for the United States, *Lockheed Corp. v. Spink*, No. 95-809 ("U.S. *Spink* Br.") at 9 (emphasis added). Indeed, Part 4 of Title I is *entitled* "Fiduciary Responsibilities." Consistent with that title, Section 406 of ERISA, 29 U.S.C. § 1106, addresses party-in-interest transactions solely as a restriction on *fiduciary* conduct.[14] Indeed, the Solicitor General acknowledged in *Spink* that Section 406 "is violated only when a *fiduciary* causes the plan to engage in one of the enumerated transactions." U.S. *Spink* Br. at 9 (emphasis in original). Section 406 does not

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[14] For example, Section 406(a)(1)(D), at issue here, declares that a "*fiduciary* . . . shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to . . . a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D) (emphasis added).

purport to bar *non*fiduciary parties in interest from entering into such transactions.

By contrast, as the Solicitor General also conceded in *Spink*, "[t]he corresponding provisions in Title II of ERISA are concerned solely with the transaction itself." U.S. *Spink* Br. at 9 n.4. Title II of ERISA addresses the treatment to be accorded parties in interest who participate in prohibited transactions involving pension plans, but it places primary responsibility for imposing any party-in-interest liability in the hands of the Internal Revenue Service—not the Secretary.[15] Specifically, Section 4975 of the Internal Revenue Code, which was enacted as part of Title II of ERISA, imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction [with a pension plan] (other than a fiduciary acting only as such)."[16] Section 4975 further defines "disqualified person" in terms almost identical to ERISA's definition of "party in interest." *Compare* 26 U.S.C. § 4975(a) and (e)(2) *with* 29 U.S.C. § 1002(14); *see also* U.S. *Spink* Br. at 8-9 (noting that "'disqualified per-

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[15] The single exception is ERISA § 502(i), 29 U.S.C. § 1132(i), which authorizes the Secretary to assess civil penalties against parties in interest who participate in prohibited transactions with welfare benefit plans. (The ESOP at issue here, by contrast, is a pension plan.) The authority to assess that penalty for non-pension plan prohibited transactions only reinforces the proposition that the IRS has the exclusive role for nonfiduciary parties in interest involved with pension plans. *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").

[16] At the time of the 1990 transaction, the IRS was authorized to levy an excise tax of 5 percent, which was then increased to 100 percent if the prohibited transaction was not corrected. 26 U.S.C. § 4975(a) and (b) (1994). That draconian 100 percent tax levy gave the Service a potent weapon for forcing parties in interest to correct prohibited transactions in order to escape the operation of the tax.

son' * * * includes most parties in interest"). Thus, Congress provided for excise tax liability against parties in interest in the Internal Revenue Code; it provided for equitable relief by the Secretary against fiduciaries in ERISA Title I. Congress did *not* give the Secretary the authority to seek equitable relief from *non*fiduciaries.

If the text and structure of ERISA left any room for doubt concerning Congress' intent to withhold from the Secretary the authority she seeks here, the legislative history of ERISA would put any such uncertainty to rest. The Senate version of the bill that became ERISA contained an express provision requiring that parties in interest "make good to" the plan any losses resulting from their participation in a prohibited transaction.[17] The original House bill, by contrast, did *not* provide for the imposition of any liability against parties in interest, but provided only for fiduciary liability for participation in prohibited transactions.[18] The conference resolved that disagreement by adopting the present system of divided enforcement:

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). *This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries.*

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[17] *See* S. 4, 93d Cong. § 15(h) (1973), *reprinted in* Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. Hist.") at 1450 (1976); *see also* S. 1179, 93d Cong. § 501(d)(17) (1973), Leg. Hist. at 955-56.

[18] *See* H.R. Conf. Rep. No. 93-1280 (amendment) (1974) ("Conf. Rep."), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075.

> *The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules . . . .*

Conf. Rep., 1974 U.S.C.C.A.N. at 5076 (emphasis added). Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, made the point even more clearly when he introduced the Conference Report. As he explained, the compromise gave "enforcement of the fiduciary provisions * * * primarily [to] the Secretary of Labor," who would be authorized "to bring civil actions to redress or restrain violations on the part of fiduciaries." By the same token, the IRS was given "responsibility for dealing with those who are 'disqualified persons'—similar to parties in interest defined in the labor portion of the conference substitute—with authority to impose excise taxes on violators." 1974 U.S.C.C.A.N. at 5177, 5188 (statement of Sen. Williams).

Section 502(a) provides the exclusive statement of civil actions available under ERISA to the Secretary, participants, and beneficiaries. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Section 502(a)(5), upon which the suit against petitioners is founded in this case, allows the Secretary to sue for equitable relief to redress a "violation" of ERISA Title I. 29 U.S.C. § 1132(a)(5). Contrary to the Eleventh Circuit's conclusion, nothing in that provision (or in the parallel private cause action found in Section 502(a)(3)) supports the "overlapping enforcement" system that the Secretary has invented, or otherwise restores to the Secretary the authority over nonfiduciaries that Congress expressly chose to deny her. Like Section 502(a)(3), Section 502(a)(5) "'does not * * * authorize 'appropriate equitable relief *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or enforc[ing] any provisions' of ERISA * * *.'" *Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens*, 508 U.S. at 253) (emphasis and brackets provided by the *Mertens* Court).

A party-in-interest's participation in a prohibited transaction is not a "violation" of any provision of Title I, and the Secretary therefore lacks any authority to "redress" it. In-

stead, responsibility for prohibited transactions, including any use of excise taxes to compel unwinding or "redressing" such transactions, was confided by Congress to IRS. For that reason, even if the language of Section 502(a)(5) could be read in isolation as broadly as the Secretary and the Eleventh Circuit read it here, that interpretation would contravene basic canons of statutory construction: "[T]he law is settled that '[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted).

3. The Eleventh Circuit's erroneous decision is sufficiently important to warrant this Court's attention. As the Secretary pointed out in *Continental Casualty*, the question whether the Secretary has statutory authority to seek equitable relief against nonfiduciaries "is important and frequently recurring." 94-1094 Pet. at 11. Because the Secretary is unlikely to cease her longstanding campaign to read *Mertens* as narrowly as is consistent with the ingenuity of the legal mind, and because that campaign has already produced a spate of inconsistent, confusing decisions that cannot be reconciled with the text of ERISA or with the core of this Court's analysis in *Mertens*, only this Court can put an end to wasteful lower court litigation by declaring, once and for all that the Secretary lacks the authority under ERISA to proceed against nonfiduciaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Alexis HERMAN, Secretary of the United States Department of Labor, Plaintiff-Appellant,

v.

SOUTH CAROLINA NATIONAL BANK; William A. Fickling, Jr., et al., Defendants-Appellees.

Frances J. KNOP; et al., Plaintiffs,

v.

CHARTER MEDICAL CORPORATION, et al., Defendants.

SOUTH CAROLINA NATIONAL BANK, Defendant-Third Party Plaintiff-Appellee,

v.

Alexis HERMAN, Secretary of the United States Department of Labor, et al., Third Party Defendants-Appellants.

SOUTH CAROLINA NATIONAL BANK, Plaintiff-Appellee,

William A. Fickling, Jr., et al., Intervenor-Plaintiffs-Appellees,

v.

Alexis HERMAN, Secretary of the United States Department of Labor, et al., Defendants-Appellants.

Nos. 97-6058, 97-6154.

United States Court Of Appeals, Eleventh Circuit

May 15, 1998.

Beneficiaries of employee stock ownership (ESOP) plan brought class action against trustee, employer, and employer's president, alleging violations of Employee Retirement Income Security Act (ERISA) in connection with trustee's payment of funds to purchase allegedly worthless stock from president. Following settlement of beneficiaries' claims, trustee filed third-party complaint against Secretary

of Labor. Trustee filed separate action against Secretary of Labor. Secretary brought separate action against trustee and president. Actions were consolidated. The United States District Court for the Northern District of Alabama, Nos. CV-92-L-2858-NE, CV-91-L-1075-NE, CV-92-H-1544-NE, Seybourn H. Lynne, J., entered summary judgment for president and partial summary judgment for trustee. Secretary appealed. The Court of Appeals, Hull, Circuit Judge, held that: (1) assuming that employer's president was "party in interest," Secretary could sue president for equitable relief under ERISA, notwithstanding that president was not plan fiduciary; (2) settlement of beneficiaries' claims did not bar Secretary's claims under doctrine of res judicata; and (3) doctrine of laches did not preclude Secretary's action.

Reversed in part, vacated in part, and remanded.

Appeals from the United States District Court for the Northern District of Alabama.

Before EDMONSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

HULL, Circuit Judge:

These three consolidated cases concern an ERISA trustee's paying $80 million from the assets of an employee stock ownership plan to purchase allegedly worthless stock from a closely held corporation's owner, his relatives, and related entities. Claiming ERISA expressly prohibits this stock purchase, the Secretary of Labor appeals the district court's grant of summary judgment to the plan's trustee and the stock sellers.[1] After review, we reverse.

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1. Alexis Herman, the current Labor Secretary, has been substituted for Lynn Martin, the Labor Secretary in 1992 who initially brought this action.

I. FACTUAL BACKGROUND

A. *The Stock Purchase*

In 1990, South Carolina National Bank ("SCNB") was the trustee of the Charter Medical Corporation Employee Stock Ownership Plan ("the Plan"). Trustee SCNB paid $80 million from Plan assets to William A. Fickling, Jr., his relatives, and related entities (the "Ficklings") to purchase their common stock in Charter Medical Corporation ("Charter"). Mr. Fickling was the President and Chairman of the Board of Directors at Charter, a closely held corporation. The Secretary contends that the Ficklings, as "parties in interest" under ERISA § 3(14), and SCNB, as the Plan trustee, violated ERISA § 406 when SCNB paid $80 million in Plan assets, or more than adequate consideration, to purchase the Ficklings' essentially worthless Charter stock.

To avoid conflicts of interest and self-dealing, ERISA prohibits stock transactions between a "party in interest" and a plan trustee. Although employee stock ownership plans ("ESOPs") invest in their employers' securities and generally are exempt from this prohibition, the exemption applies only if the transaction is for "adequate consideration."[2] Before addressing further the Secretary's action against SCNB and the Ficklings, we review the two other lawsuits about this stock purchase that became consolidated with the Secretary's action.

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2. An employee stock ownership plan is an ERISA plan that invests primarily in the employer's stock. 29 U.S.C. § 1107(d)(6)(A). *See infra* notes 10 and 20 for discussion of this ERISA prohibition and exemption. Charter's stock was not publicly traded and had no established market price. The Secretary contends the parties improperly evaluated the impact of over one and one-half billion dollars in corporate debt on Charter's solvency and the value of its stock.

B. *Private Litigants' Lawsuit Against Charter, the Ficklings, and SCNB*

In 1991, private litigants brought a class action against Charter, the Ficklings, SCNB, and others (the "*Knop* action").[3] The plaintiff class consisted of the Plan's beneficiaries, who alleged violations of ERISA, federal securities laws, and state law in both this $80 million stock purchase in 1990 and an earlier $375 million stock purchase in 1988. The Secretary was not a party to the *Knop* class action.

In March 1992, the Secretary was advised that the private litigants were settling with all defendants. The Secretary responded that she was conducting her own investigation of the stock transactions and was not bound by the private litigants' settlement. The Secretary received the formal settlement documents on April 6, 1992. By this time, the Secretary's expert had advised that Charter's significant debt of one and one-half billion dollars and the stock valuation errors during the 1990 purchase made the stock essentially worthless. On April 9, 1992, the Secretary again advised the *Knop* parties that the Secretary was continuing her investigation, may bring suit, and was not bound by the *Knop* settlement. None of the parties sought to join the Secretary in the *Knop* action.

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3. The three consolidated lawsuits are: (a) the Secretary's complaint in *Martin v. South Carolina Nat'l Bank, et al.*, No. CV-92-2858-NE (N.D.Ala. July 24, 1992) (transferred from M.D. Ga.); (b) SCNB's third party complaint against the Secretary in *Knop, et al. v. Charter Med. Corp, et al.*, No. 91-L-1075-NE (N.D.Ala. May 10, 1991) (third party complaint filed Aug. 18, 1992); and (c) SCNB's complaint against the Secretary in *South Carolina Nat'l Bank v. Martin*, No. 92-H-1544-NE (N.D.Ala. July 7, 1992).

At the *Knop* fairness hearing on April 30, 1992, the district court approved the settlement. Charter made a $12.3 million financial contribution to the settlement, but the Ficklings and SCNB did not contribute any money to the settlement.[4] Nonetheless, the private litigants dismissed with prejudice all claims against the Ficklings and SCNB. *Knop* counsel informed the district court that the Secretary had advised the parties that the Department of Labor "had no desire to impede the proposed settlement but that their silence should not be taken as restricting whatever they might do in the future."

C. *SCNB's Lawsuit Against the Secretary*

Immediately after the *Knop* settlement, SCNB filed a new lawsuit against the Secretary on July 7, 1992, and simultaneously moved in *Knop* to file a third party complaint against the Secretary.[5] Each case sought a declaration that the Secretary was in privity with the private *Knop* plaintiffs and that the *Knop* settlement precluded the Secretary from additional relief in any future lawsuit.

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4. SCNB stresses that Charter funded the *Knop* settlement as part of Charter's agreement to indemnify SCNB. The Ficklings also contend that they contributed financially because: (a) as preferred shareholders they surrendered certain priority rights as part of a bankruptcy plan of reorganization that allowed the Plan to obtain some value for the allegedly worthless stock; and (b) they consented to less favorable allocation of common stock. The Secretary disputes this contention and argues that there is no evidence that these conditions resulted in a benefit to the Plan or a sacrifice by the Ficklings and that there is some evidence to suggest that the reverse is true. In any event, given the magnitude of the Plan's losses, these contributions were negligible.

5. *See supra* note 3.

D. *Secretary's Lawsuit Against the Ficklings and SCNB*

On July 24, 1992, the Secretary filed her own action against the Ficklings and SCNB.[6] The Secretary did not sue Charter or any parties contributing monetarily to the *Knop* settlement, but sued only the Ficklings and SCNB, who paid nothing. The Secretary sought to recover from the Ficklings and SCNB $80 million (offset by sums already recovered), ERISA's statutory civil penalties, equitable relief for recission and disgorgement of profits, and injunctive relief.

E. *Three Lawsuits Consolidated*

In late 1992, the three lawsuits were consolidated because each involved whether the Secretary was bound by the private *Knop* settlement. In early 1993, the Ficklings and SCNB moved for summary judgment. In a June 25, 1993 order, the district court granted summary judgment for the Ficklings in a single sentence without analysis, citing only *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991). However, as discussed *infra*, *Useden* supports, not defeats, the Secretary's claim against the Ficklings.

In contrast to the Ficklings' motion, the district court held in abeyance SCNB's motion for partial summary judgment and permitted discovery only on the narrow issue of whether SCNB had breached its fiduciary obligations. The Secretary was prohibited from conducting discovery on SCNB's claims of laches, res judicata, and release and other issues. In 1996, the district court granted SCNB's 1993 motion for partial summary judgment, finding that laches, res judicata, and release barred the Secretary's claims. The district court did not distinguish between the Secretary's legal claims for money damages, equitable claims for disgorgement of profits, or right to assess ERISA's civil penalties, but treated all as claims for monetary relief.

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6. *See supra* note 3.

[1] Subsequently, the Secretary and SCNB settled her claims for injunctive relief, making the case final.[7] The Secretary then appealed the district court's grant of summary judgment for the Ficklings and SCNB on the Secretary's remaining legal and equitable claims and right to assess civil penalties.[8]

II. ERISA § 406 PROHIBITS THIS STOCK TRANSACTION BETWEEN PLAN AND "PARTIES IN INTEREST"

We first examine the ERISA violation in issue. The Secretary alleges that the Ficklings are "parties in interest," as defined under ERISA § 3(14), and that they violated ERISA § 406 by engaging in a prohibited stock transaction with SCNB.

As alleged by the Secretary, ERISA § 406 does prohibit stock transactions between an ERISA plan and a "party in interest", as follows:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--
>
> (A) sale or exchange, or leasing, of any property *between the plan and a party in interest*;
>
> . . .
>
> (D) *transfer to*, or use by or for the benefit of, *a party in interest, of any assets of the plan*;
>
> . . . .

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7. SCNB agreed not to serve as a trustee for any ERISA plan for three years or ever again for Charter's plan.

8. We review a district court's grant of summary judgment *de novo*. *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991).

29 U.S.C. § 1106(a)(1)(A),(D) (ERISA § 406(a)(1)(A), (D)) (emphasis supplied).

Also, the Ficklings may be considered "parties in interest" under a number of § 3(14)'s definitions.[9] ERISA § 3(14) defines a "party in interest" to include fiduciaries, plan employees, service providers, employers whose employees are covered by ERISA plans, employee organizations whose members are covered by a plan, and owners of 50% or more of stock in these employers and employee organizations, or a relative of such an owner. 29 U.S.C. § 1002(14) (ERISA § 3(14)). A "party in interest" also includes employees, officers, and directors, as well as shareholders, partners, and joint venturers owning ten percent or more of entities that are themselves "parties in interest." *Id.*

[2] ERISA prohibits stock transactions between a plan and a "party in interest" because of the obvious conflicts of interest and the high potential for abuse and injury to the plan. *See* 29 U.S.C. § 1106(a)(1)(A), (D) (ERISA § 406(a)(1)(A),(D)). The Supreme Court noted that in enacting § 406(a) barring transactions between a "party in interest" and an ERISA plan, "Congress' goal was to bar categorically a transaction that was likely to injure the

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9. The district court's order, dated December 3, 1992, transferring the Secretary's action from Georgia to Alabama, made a finding that "Mr. Fickling was a 'party in interest' with respect to the ESOP under ERISA, as were his relatives and affiliated business entities." *Martin v. South Carolina Bank, et al.*, No. 92-298-1-MAC(DF), at 2 (M.D.Ga. Dec. 3, 1993). Subsequently, the district court in Alabama granted summary judgment to the Ficklings on a different basis, without completed discovery on, and without reaching, the "party in interest" issue. Thus, our analysis assumes *arguendo* that the Ficklings are "parties in interest" as the Secretary alleges. *See also infra* note 26.

pension plan, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160, 113 S. Ct. 2006, 2012, 124 L. Ed. 2d 71 (1993). It is clear that a stock transaction for more than adequate consideration between SCNB, as Plan trustee, and the Ficklings, as "parties in interest," violates § 406.[10] The parties mainly dispute whether the Secretary can sue the Ficklings as "parties in interest" for participating in that stock transaction prohibited by § 406 or only the fiduciary SCNB.

III. SECRETARY MAY SUE FICKLINGS FOR EQUITABLE RELIEF UNDER § 502(a)(5) FOR ACTS VIOLATING § 406

A. *Useden Distinguishes Suits Against Non-fiduciaries Under §§ 502(a)(2) and 409 From Suits Against Non-fiduciary "Parties in Interest" Under §§ 502(a)(5) and 406*

The district court granted summary judgment to the Ficklings, citing only this court's decision in *Useden v.*

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10. Since an ESOP invests mainly in an employer's securities, ERISA § 408(e) exempts from § 406's prohibited transactions an ESOP's acquisition of employer stock if (1) the acquisition is for "adequate consideration," and (2) no commission is charged with respect to the acquisition. 29 U S.C. § 1108(e) (ERISA § 408(e)). The Secretary alleges that the § 408(e) exemption does not apply to the Plan's stock purchase because the Plan paid more than adequate consideration for the stock. The issue of whether the consideration was adequate was never resolved in the district court and is not before this court on appeal. Instead, the parties and the court have assumed *arguendo* for this appeal that SCNB paid more than adequate consideration for the allegedly worthless stock. *See infra* note 20.

breach of fiduciary duties under § *409* and holds that *non-fiduciaries* cannot be sued under § 502(a)(2) for *breaching fiduciary duties* under § *409*. However, *Useden* supports, not defeats, the Secretary's claim against the Ficklings as "parties in interest" under § *406* because *Useden* goes further and indicates that § *502(a)(5)* authorizes suits for equitable relief against *non-fiduciary "parties in interest"* whose *acts violate* §*406* without restricting the type of party who may be sued. *See Useden*, 947 F.2d at 1581. Comparisons of § 409 versus § 406 and § 502(a)(2) versus § 502(a)(5), plus review of *Useden*, readily reveal why the Secretary can sue the Ficklings here.

[3] We begin with ERISA § 502(a), where Congress outlined who may bring civil actions and for what relief. A comparison of § 502(a)(2) with § 502(a)(5) follows:

> A civil action may be brought--
>
> . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary *for appropriate relief under section [409];* [11]
>
> . . .
>
> (5) . . . by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) *to obtain other appropriate equitable relief* (i) *to redress such violation* or (ii) to enforce any provision of this subchapter; . . . .

29 U.S.C. § 1132(a)(2), (5) (ERISA § 502(a)(2), (5)) (emphasis supplied). Section 502(a)(5) authorizes the Secretary to obtain "appropriate equitable relief" to redress ERISA violations. While § 502(a)(5) limits the Secretary to

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11. 29 U.S.C. § 502(a)(2) refers to appropriate relief under § 1109 of Title 29, the codified version of § 409 of ERISA.

only "equitable relief," § 502(a)(5) does not restrict "the types of parties who can be so sued." *Useden*, 947 F.2d at 1581. Section 502(a)(5) does not restrict equitable relief to being against only fiduciaries.

In contrast, the Secretary may sue under § 502(a)(2), but only "for appropriate relief under section [409]." Section 502(a)(2), in effect, incorporates § 409, and thereby limitsrelief to that available under § 409. We thus turn to § 409, which provides that only *fiduciaries* "shall be personally liable" for breach of *fiduciary* duties, as follows:

> *Any person who is a fiduciary* with respect to a plan who breaches any of the responsibilities, obligations, or duties *imposed upon fiduciaries* by this subchapter *shall be personally liable* to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of *such fiduciary* which have been made through use of assets of the plan *by the fiduciary*, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of *such fiduciary.*

29 U.S.C. § 1109(a) (ERISA § 409(a)) (emphasis supplied).

The *Useden* court read the terms of § 409 and § 502(a)(2), referencing § 409, as limiting relief to *fiduciaries* for breaches of *fiduciary* duties. *Useden* held that the defendants [sic] bank and attorneys, who had advised the former plan fiduciary trustee, were not liable for *breaches of fiduciary* duties under §§ 409 and 502(a)(2) because the bank and attorneys had not acquired *fiduciary status* in the financial transactions in issue. *Useden*, 947 F.2d at 1572-79.

Importantly for this case, *Useden* went further and pointed out significant differences between § 409 and § 406 and between § 502(a)(2) and § 502(a)(5). *Useden* first noted the absence of textual treatment of non-fiduciaries in § 409 and § 409's express language limiting personal liability to fiduciaries. *Useden* then contrasted that with § 3(14)(B)'s broad definition of "parties in interest with whom plans are prohibited to enter into certain transactions under section

406(a)" and §502(a)(5)'s authorization of suit for equitable relief for "any act or practice" violating ERISA "without restricting the type of parties who may be sued." *Id.* at 1581. *Useden* summarized these important differences in these ERISA statutes, as follows:

> In the present case, appellant would have us ignore the obvious care with which ERISA's remedial provisions are formulated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach. Congress clearly contemplated the involvement of non-fiduciary parties with employee benefit plans when it drafted provisions of ERISA. *For example, ERISA sections 502(a)(3) and 502(a)(5) authorize suits to enjoin or obtain other equitable relief for "any act or practice" violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued. ERISA section 3(14)(B), moreover, broadly defines the "parties in interest" with whom plans are prohibited to enter into certain transactions under section 406(a).* Significantly, however, Congress expressly limited the scope of sections 502(a)(3) and 502(a)(5) to equitable remedies, and likewise limited section 409(a) to provide a right of action only against fiduciaries. It is telling that, *despite textual treatment of non-fiduciaries in various other parts of the ERISA scheme,* provisions [§§ 409 and 502(a)(2)] relevant to appellant's theory contain no textual support for a claim for monetary damages against non-fiduciaries. We cannot infer that Congress's silence is accidental in an area where Congress has already said so much out loud.

Id. at 1581-82 (citations omitted) (emphasis supplied). Construing first §§ 409 and 502(a)(2), *Useden* holds only that *non-fiduciaries* cannot be sued for *breach of fiduciary duties* because § 409 contains no references to non-fiduciaries and because Congress expressly limited liability in §§ 409 and 502(a)(2) to fiduciaries.

[4] In reaching this holding, *Useden* then contrasts §§ 409 and 502(a)(2) with §§ 406 and 502(a)(5) and answers in dicta the very different question posed here regarding who can be sued for equitable relief under § 502(a)(5) for engaging in stock transactions prohibited by § 406. In short, who can the Secretary sue for acts that violate ERISA § 406? *Useden* directly points to a "party in interest" who participates in a prohibited transaction in violation of § 406 as an example of a non-fiduciary against whom relief may be sought under § 502(a)(5). *Id.* at 1581. This is precisely the Secretary's claim against the Ficklings in this case.[12] In addition to pointing out ERISA's textual treatment of "parties in interest" in §406, *Useden* goes further and concludes these "parties in interest" can be sued for equitable relief under § 502(a)(5) because § 502(a)(5) does not restrict the type of parties who may be sued.

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12. In holding that a non-fiduciary cannot be sued for breach of fiduciary duties in *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994), the First Circuit also compared § 409 against § 406 and contrasted actions against non-fiduciaries for participation in a fiduciary's breach with actions against non-fiduciary "parties in interest" for participation in prohibited transactions. The First Circuit concluded that "although fiduciary breaches also violate ERISA, non-fiduciaries cannot, by definition, engage in the act or practice of breaching a fiduciary duty. Non-fiduciaries can, however, engage in the act or practice of transacting with an ERISA plan." *Id.* at 31 n.7.

B. *Other Circuits Hold Non-fiduciary "Parties in Interest" May Be Sued for Violating § 406*

Similar to *Useden*'s dicta, other circuit courts have held uniformly that an ERISA-defined "party in interest," like the Ficklings, may be sued for equitable relief under either § 502(a)(5) or § 502(a)(3) when that "party in interest" violates ERISA by engaging in transactions with fiduciaries prohibited by § 406. *See Reich v. Stangl*, 73 F.3d 1027 (10th Cir.), *cert. denied*, --- U.S. ---, 117 S. Ct. 48, 136 L. Ed. 2d 13 (1996) (§ 502(a)(5)); *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995) (§ 502(a)(3)); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995) (§ 502(a)(5)); *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) (§ 502(a)(3)); *see also Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994) (§ 502(a)(5)). Where a fiduciary and a "party in interest" directly engage in a transaction that violates § 406, no circuit has limited relief under § 502(a)(5) to only the fiduciary. Instead, reading §§ 502(a)(5) and 406 together, these circuits have held that the ERISA "party in interest" who benefitted from the impermissible transaction with the fiduciary is liable under ERISA for equitable relief and is required to disgorge ill-gotten assets from the ERISA plan.

We agree with the panel's dicta in *Useden* and other circuits addressing this same issue, and now hold that under §§ 502(a)(5) and 406 the Secretary may seek equitable relief from "parties in interest" to transactions prohibited by § 406. As *Useden* points out, § 502(a)(5) is aimed at such " act[s] or practice[s] violating [ERISA]' without restricting the types of parties who may be so sued." *Id* at 1581.

C. *Supreme Court's Mertens*

The Ficklings emphasize that § 406 begins, like § 409, with the term "fiduciary" and that § 406 provides that a fiduciary shall not cause the plan to enter into prohibited transactions with "parties in interest." The Ficklings argue that § 406 imposes a duty on only fiduciaries not to cause a plan to enter into transactions with "parties in interest," but does not prohibit a "party in interest" from entering into that same transaction with a fiduciary. This argument, however,

ignores key differences in the statutory language of § 406 and § 409, plus the Supreme Court's recent decision in *Mertens* recognizing § 406's prohibition on "parties in interest" engaging in transactions with an ERISA plan.

First, as to the statutory language, § 409 provides that a fiduciary "shall be personally liable" for breaches of fiduciary duties. In contrast, § 406 does not address, much less limit, who shall be personally liable; instead § 406 prescribes the type of transactions that ERISA prohibits. While § 406 does instruct fiduciaries–typically the plan trustee–not to cause the plan to enter into transactions with "parties in interest," § 406 also serves to prohibit transactions between a fiduciary and a "party in interest." Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a "party in interest" remains a prohibited transaction under § 406. *See Useden*, 947 F.2d at 1581-82; *Reich v. Stangl*, 73 F.3d 1027, 1030-31 (10th Cir. 1996); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994); *Reich v. Compton*, 57 F.3d 270, 285-86 (3d Cir. 1995); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988).

Second, § 502(a)(2) limits the Secretary to only "appropriate relief under section [409]," and then § 409 limits personal liability to fiduciaries. In contrast, § 502(a)(5), as *Useden* recognizes, permits the Secretary to obtain equitable relief to address any act or practice that violates § 406 without restricting who may be sued. *See Useden*, 947 F.2d at 1581. As "parties in interest" to a prohibited transaction, the Ficklings engaged in an act or practice that violates ERISA. Section 502(a)(5) thus expressly authorizes the Secretary to obtain appropriate equitable relief from the Ficklings to redress that ERISA violation. While the Ficklings may not be subjected to legal claims for compensatory damages for joining in a fiduciary's breach under § 409, they may be liable as "parties in interest" for equitable disgorgement of their profits received from engaging in a prohibited transaction in violation of § 406.

More importantly, a recent Supreme Court decision supports *Useden*'s analysis of § 406. In *Mertens v. Hewitt*

Assocs., 508 U.S. 248, 260-61, 113 S. Ct. 2063, 2070-71, 124 L. Ed. 2d 161 (1993), the Supreme Court acknowledged in dicta that non-fiduciaries may be sued and required under § 502(a)(5) to disgorge illgotten [sic] plan assets or profits obtained through participation in transactions prohibited by § 406. The Supreme Court explained that "the equitable relief' awardable under §502(a)(5) includes restitution of ill-gotten plan assets or profits . . . ." *Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070-71. The Supreme Court held that non-fiduciaries may not be liable for the legal remedy of compensatory damages for breach of fiduciary duties because ERISA contains no provision requiring non-fiduciaries to avoid participation in a fiduciary's breach of fiduciary duty.

However, the Supreme Court also contrasted the lack of any ERISA provision regarding a non-fiduciary's participation in a fiduciary's breach with other ERISA provisions, such as § 406 "that can be read as imposing obligations upon nonfiduciaries . . . ." *Id.* at 253-54, 113 S. Ct. at 2067. As an example of a provision that imposes such an obligation, the Supreme Court cited § 406(a)'s prohibition on "parties in interest" offering services or engaging in other transactions with the plan. *Id.* at 254 n.4, 113 S. Ct. at 2067 n.4. The Supreme Court further stated that professional service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties or excise taxes...." *Id.* at 262, 113 S. Ct. at 2071-72 (citations omitted).

[5] While *Mertens* involved service providers, the concept that "parties in interest" can be sued for disgorgement of profits for participating in a transaction prohibited by § 406 is no less applicable to other non-fiduciary "parties in interest," such as the Ficklings.[13] See

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13. The Third and Tenth Circuits also found that the Supreme Court in *Mertens* implied that a non-fiduciary "party in

[Footnote continued on next page]

29 U. S.C. § 1002(14)(B) (ERISA § 3(14)(B)) (including service providers within the definition of "parties in interest"). Even though disgorgement of profits may produce money, *Mertens* makes it clear that disgorgement of profits is a distinctly equitable remedy different from the legal remedy of compensatory damages for breach of fiduciary duty. *See Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070-71. The Court's definition of appropriate equitable relief under § 502(a)(5) clearly encompasses the fruits of a prohibited transaction from "parties in interest" like the Ficklings.[14]

In sum, under § 502(a)(5), the Secretary may sue the Ficklings as "parties in interest" for equitable relief for engaging in a prohibited transaction with SCNB in violation of § 406. Therefore, the district court erred in granting summary judgment to the Ficklings.

IV. PRIVATE LITIGANTS' SETTLEMENT DOES NOT BAR SECRETARY'S ACTION

The Ficklings and SCNB next contend that the *Knop* private settlement bars the Secretary's action against them. This issue requires us to examine the Secretary's special statutory role in seeking relief and assessing civil penalties for ERISA violations.

[Footnote continued from previous page]

interest" may be liable under §502(a)(5) for participating in transactions prohibited by § 406. *Reich v. Compton*, 57 F.3d 270, 285 (3rd Cir. 1995); *Reich v. Stangi*, 73 F.3d 1027, 1032 (10th Cir. 1996).

14. In *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783, 135 L.Ed. 2d 153 (1996), the Supreme Court acknowledged that *Mertens's* statements about § 406 were dicta, but declined to retreat from that dicta and stated again, albeit in dicta, that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA." *Id.* at 889 n.3, 116 S. Ct. at 1789 n.3.

A. *Secretary's Statutory Role*

In § 502(a), Congress granted the Secretary an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the "national public interest." ERISA itself contains a declaration of public purpose that recognizes that the economic impact of private benefit plans affects the "national public interest."[15] *See* 29 U.S.C. § 1001(a) (ERISA § 2(a)). Private ERISA litigants seek to redress individual grievances. However, in suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

One circuit court succinctly summarized the Secretary's national public interest in bringing ERISA actions as ensuring "the financial stability of billions of dollars of assets which in turn have a monumental effect on not only the Treasury of the United States, but on the national economy and commerce as well." *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc). In addition to recovering plan losses, the Secretary "has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the program itself." *Id.* at 692-93.

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15. ERISA's statement of purpose provides "that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is [sic] increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; *that they are affected with a national public interest....*" 29 U.S.C. § 1001(a) (ERISA §2(a)) (emphasis supplied).

ERISA's legislative history also emphasizes the Secretary's national public interest in deterrence, including the need for the Labor Department to have "broad authority to monitor employee benefit plans and deter violations of the law," and to "restructure its enforcement efforts to emphasize deterrence." H. Conf. Rep. No. 101-386, at 431-32 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3035.[16] The congressional Conference Committee concluded that the Secretary must have and use enforcement powers and civil penalties to make ERISA meaningful, as follows:

> [I]t has become apparent that the Department must use its enforcement powers more vigorously to make the protection of ERISA meaningful. The conferees believe strengthened civil penalties will better enable the Department to protect participants and beneficiaries. The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

Id. at 3035-36. Against this statutory background, we examine why the private litigants' settlement in *Knop* does not bar the Secretary's action here.

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16. In 1989, Congress expanded § 502 to confer additional enforcement powers upon the Secretary, including assessment of civil penalties against plan administrators, § 502(c)(2), "parties in interest," § 502(i), fiduciaries, § 502(*l*)(1)(A), (m), and, in some instances, against "any person," § 502(c)(4), (c)(5), (l)(1)(B). Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 103 Stat. 2123. These civil penalties go directly to the United States Treasury. While the Secretary must assess civil penalties, none of the contested issues about these civil penalties is presently before the court on appeal.

B. *Res Judicata*

[6--8] The district court incorrectly held that the private litigants' settlement barred the Secretary's claims under the doctrine of res judicata or claim preclusion.[17] This doctrine does not apply unless "the parties to both actions, or those in privity with them, are identical." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991); *see also Hart v. Yamaha-Parts Distributs., Inc.*, 787 F.2d 1468, 1471-72 (11th Cir. 1986). This circuit has held that " '[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated.' " *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d. 835 (1989) (quoting *Wilson v. Attaway*, 757 F.2d 1227, 1237(11th Cir. 1985)). The doctrine does not apply here because the Secretary was not a party to the *Knop* settlement and has national public interests separate and distinct from those of the *Knop* private litigants.

Every circuit addressing the issue has held that the Secretary is not bound by prior private litigation when the Secretary files an independent action to address ERISA violations. *See, e.g., Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991), *cert. denied sub nom., Levy v. Martin*, 504 US. 909, 112 S. Ct. 1937, 118L. Ed. 2d. 544 (1992); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690-94 (7th Cir. 1986); *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir.

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17. Application of res judicata presents questions of law reviewed *de novo*. *Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996); *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 921-22 (11th Cir. 1990). For the same reasons that res judicata principles do not apply in this case, the *Knop* plaintiffs could not release the Secretary's claims against the defendants.

1983); *see also Brock v. Gillikin*, 677 F. Supp. 398, 402 (E.D.N.C. 1987). Each court recognized that the Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants who seek to redress individual grievances or recoup plan losses for their personal benefit as plan beneficiaries. *See, e.g., Fitzsimmons*, 805 F.2d at 693-94. The courts note that under ERISA's statutory framework, private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary.[18]

A previous ERISA decision from this circuit foreshadows our similar conclusion that the *Knop* private settlement does not bar the *Secretary's* action here. In *Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775 (11th Cir. 1987), this court affirmed a denial of the Secretary's motion to intervene to oppose a plan participants' class action settlement. This court noted that the Secretary's interests were not prejudiced significantly by the settlement because "the Secretary

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18. The district court cited footnote 9 in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) for the proposition that the Secretary sues only in a representative capacity. However, *Russell's* footnote 9 addressed only actions under § 502(a)(2) for breach of fiduciary duties under § 409. *Russell* did not involve res judicata or a Secretary's claim under § 502(a)(5) for equitable relief against "parties in interest" participating in a prohibited transaction in violation of § 406. *Russell* also points out that § 502(a)(2) "authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries." 473 U.S. at 142 n.9, 105 S. Ct. at 3090 n.9. In contrast, ERISA separates the Secretary's right to sue for ERISA violations in § 502(a)(5) from the participant's, beneficiary's, and fiduciary's right to sue for ERISA violations in § 502(a)(3).

certainly may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important." *Id.* at 779. *Campbell* recognized that the Secretary has an independent right to sue. A corollary to *Campbell* is that a private litigation settlement does not preclude the Secretary's separate action.

Similar to this case, the Secretary's main objection to the private settlement in the Seventh Circuit's *Fitzsimmons* decision was that the private "recovery was wholly inadequate in light of the number and dollar amount of the claims against the former trustees and also that the settlement agreement failed to allow recovery from the personal assets of the former trustees." *Fitzsimmons*, 805 F.2d at 686. After extensive review of ERISA's statutory framework and purposes, the Seventh Circuit en banc held directly that the private settlement did not bar the Secretary's independent right to sue. *Id.* at 694.[19]

[9] These ERISA cases are consistent with the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public

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19. Appellees quote selective statements from *Fitzsimmons* and argue that a private settlement limits the Secretary to only injunctive relief, even if the Secretary can sue independently. *Fitzsimmons's* discussion about the separate interest of the Secretary in obtaining injunctive relief is only one of the many examples of the Secretary's separate interests discussed in *Fitzsimmons.* The Seventh Circuit also discusses the Secretary's separate legal interests in protecting a plan's financial stability, in obtaining disgorgement of illegal profits, in preventing unjust enrichment, in restoring plan assets, in protecting beneficiaries' incomes, and in deterring future ERISA violations, all of which implicate monetary recoveries. (The civil penalties, enacted in 1989, were not in effect when *Fitzsimmons* was decided.)

and private interests. *See Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23, 102 S. Ct. 2421, 2430 n.23, 72 L. Ed. 2d. 824 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373 n.6, 95 S. Ct. 2296, 2305 n.6, 45 L. Ed. 2d. 245 (1975); *Sam Fox Publ'g Co., Inc. v. United States*, 366 U.S. 683, 689-90, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d. 604 (1961); *United States v. East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979). In *East Baton Rouge Parish School Board*, this court also recognized this general principle that a private plaintiff's prior litigation does not bar the government's action, stating:

> [T]he district court's conclusion [that the private plaintiffs and the United States were identical] is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.

East Baton Rouge Parish Sch. Bd., 594 F.2d at *58 (*quoting in part *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (citations omitted)).

Subsequently, the Fifth Circuit directly applied this same principle to an ERISA case similar to this one, *Donovan v.*

Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). In *Donovan*, an ESOP trustee allegedly had paid more than adequate consideration for the stock of the company's president.[20] The Fifth Circuit concluded that the Secretary's interest was different from private plaintiffs' interests and, thus, the Secretary was not precluded from bringing an independent action for ERISA violations. *Id.*[21]

The ERISA enforcement scheme, carefully constructed by Congress, is undermined if private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary's action. The terms of the *Knop* private settlement illustrate why this result is not what Congress intended, or provided, in ERISA. The *Knop* settlement recovered from Charter only a small fraction of the Plan's $80 million in assets lost in the stock purchase. The private plaintiffs released and dismissed with prejudice both SCNB and the

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20. The Fifth Circuit held that the "adequate consideration" exemption in ERISA § 408 was not applicable and thus the stock transaction was prohibited by ERISA § 406. *Donovan* discusses at length the mechanics of ESOPs, the duties of ESOP fiduciaries under ERISA, and the nature of the inadequate consideration exemption in ERISA § 408. *See generally Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983); *see also supra* note 10.

21. Appellees contend *Donovan* supports their defense that the Secretary's independent action is limited to injunctive relief. We disagree. *Donovan's* discussion of injunctive relief concerned only whether the Secretary's action was moot because the private parties dissolved the ESOP as part of their settlement. In fact, the *Donovan* court noted that whether the Secretary's equitable claim for disgorgement was barred was not addressed by the district court and remanded that issue because "the parties have not adequately addressed the issues raised by these remedial arguments in the special context of ERISA." *Donovan*, 716 F.2d at 1462-63 & n.10.

Ficklings despite having alleged serious ERISA violations against them and even though they made a negligible contribution to the settlement. Since only the Secretary can assess civil penalties, none were paid.[22]

While private plaintiffs understandably may be willing to compromise claims to gain prompt and definitive relief, the

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22. Defendants rely heavily on EEOC cases from other circuits that preclude the EEOC from recovering monetary relief for private individuals who already have settled in their own name. However, this circuit has recognized that the interests of the EEOC and private litigants at times "are not necessarily compatible," and "are not always identical." *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 922-23 (11th Cir. 1990) (holding private litigant's Title VII claims not barred by EEOC's settled suit). *Riddle* concluded that although the EEOC is able to recover damages for back pay and benefits, the EEOC is primarily interested in preventing employment discrimination in the workplace; whereas, the aggrieved individual is more interested in "specific personal relief" in her private action. *Id.* at 922-23.

Defendants' reliance on EEOC cases also ignores the different statutory enforcement schemes of Title VII and the ADEA, which reflect Congress's intent to limit multiple suits. Title VII and the ADEA require a private plaintiff to file a discrimination charge with the EEOC before suing. 42 U.S.C. § 2000e-5(b), (e), and (f) 29 U.S.C. § 626(d). The ADEA also terminates a private plaintiff's right of action under the ADEA upon "commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." 29 U.S.C. § 626(c)(1). In contrast, ERISA gives plan beneficiaries and the Secretary independent rights of action, does not require private plaintiffs to file charges with the Secretary before suing, and nowhere forecloses private actions after the Secretary files suit, or, the Secretary's suit after a private action commences.

Knop settlement does not further the broader national public interests represented by the Secretary and reflected in Congress's delegation of ERISA enforcement powers to the Secretary. The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and "parties in interest" from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

C. *ERISA § 502(h)*

[10] The district court emphasized that ERISA § 502(h) requires private litigants to serve their complaint on the Secretary and gives the Secretary discretion to intervene. *See* 29 U.S.C. § 1132(h) (ERISA § 502(h)). The purpose of § 502(h) is to provide the Secretary notice of ongoing private lawsuits. *See Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691 (7th Cir. 1986) (en banc). In § 502(h) Congress gave the Secretary discretion to intervene, but chose not to require the Secretary to do so. As the Seventh Circuit noted, Congress "never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata." *Id.* As this court previously recognized, "[t]he courts should not jam judicially created doctrines such as res judicata into the gears of Congress' carefully crafted statutory machinery." *United States v. Barnette*, 10 F.3d 1553, 1561 (11th Cir. 1994).

[11] Given the volume of cases the Department of Labor monitors, courts recognize that it is unreasonable and unwise to require the Secretary to intervene in every ERISA action

or be precluded.[23] *See, e.g., Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (stating that to bar Secretary's ERISA action as a result of private settlement "would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention"). Likewise, we decline to mandate judicially that the Secretary must intervene or be barred because this would frustrate Congress's express decision to leave intervention to the Secretary's "discretion" in § 502(h) and would permit defendants violating ERISA to settle quickly with private plaintiffs and defeat the Secretary's enforcement powers granted by Congress.

D. *Laches*

[12,13] The district court also incorrectly held that the doctrine of laches precluded the Secretary's action against SCNB. "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 1020, 84 L. Ed. 1283 (1940); *United States v. Fernon*, 640 F.2d 609, 612 (5th Cir. Unit B Mar. 1981) (following *Summerlin*). This principle protects public rights vested in the government for the benefit of all from "the inadvertence of the agents upon which the government must necessarily rely." *United States v. Alvarado*, 5 F.3d 1425, 1427(11th Cir. 1993); *see also*

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23. In 1989, the congressional Conference Committee, reporting on the civil penalties in § 502(*l*) noted that the Department of Labor was responsible for approximately 5.5 million employee benefit plans holding $2 trillion in assets and that the Department's resources had not kept pace with the growing importance of the benefits to the public, the expanding amount of plan assets, or the increasing number of plans. H.R. CONF. REP. NO. 101-386, at 432 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3029, 3035.

United States v. Arrow Transp. Co., 658 F.2d 392, 394-95 (5th Cir. Unit B Oct. 1981) ("Although the fact situation describes a textbook case of laches, that defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest.").

[14] To overcome this accepted rule, the district court relied upon Title VII cases. However, this circuit permits laches to bar an EEOC suit only because Title VII contains no statute of limitations. *See e.g., EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1201-02 (11th Cir. 1982) ("Laches is an equitable doctrine designed to prevent unfairness to a defendant due to a plaintiff's delay in filing suit *in the absence of an appropriate statute of limitations.*") (emphasis supplied); *see also EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988); *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 959 (9th Cir. 1979); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978).

In contrast, ERISA contains a detailed statute of limitations for actions regarding certain fiduciary breaches and ERISA violations. The Secretary filed her lawsuit within the time permitted by ERISA.[24] The rationale in EEOC suits for departing from the accepted rule is not present here.[25] Given

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24. Congress has specified the limitations period for a variety of circumstances, providing that an ERISA plaintiff must sue within six years from the last breach or violation, within three years from the date of actual knowledge of a breach or violation, or, in the case of fraud or concealment, within six years from the date of discovery of the breach or violation. 29 U.S.C. § 1113 (ERISA § 413). Allowing the federal government, in effect, to be estopped frustrates federal statutes and infringes upon Congress's exclusive authority to make law.

25. Neither the district court nor the defendants cite any authority grafting the EEOC exception onto ERISA. Defendants do cite

[Footnote continued on next page]

the Supreme Court's mandate that the judiciary not tamper with ERISA's enforcement scheme, *Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134, 147, 105 S. Ct. 3085, 3092-93, 87 L. Ed. 2d. 96 (1985), and our circuit's recognition of the importance of ERISA's time lines, *Brock v. Nellis*, 809 F.2d 753, 754 (11th Cir. 1987), the district court erred in extending the laches exception in Title VII to ERISA actions. *See Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1259, 1308-09 (S.D.N.Y 1993); *First Bank Sys., Inc. v. Martin*, 782 F. Supp. 425, 426-27 (D.Minn. 1991); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1403 (D. Nev. 1984).

V. CONCLUSION

In conclusion, the *Knop* private settlement does not bar the Secretary's independent right to sue under ERISA in this case. Accordingly, the district court erred in granting summary judgment in favor of the defendants SCNB and the Ficklings. The Secretary's action may proceed against SCNB as a fiduciary for legal and equitable relief and civil penalties. The Secretary's action may proceed against the Ficklings as "parties in interest" for civil penalties and equitable relief, including but not limited to disgorgement of profits, rescission, and restitution of Plan losses.[26]

[Footnote continued from previous page]

Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078 (7th Cir. 1992), but the majority in *Martin* pretermitted deciding whether laches applied by finding "the elements of laches have not been met in the case before us." 966 F.2d at 1091. *But see* 966 F.2d at 1100 (Posner, J., concurring).

26. When the case returns to the district court, each party should be allowed to complete discovery, including on whether each of the Fickling defendants is a "party in interest" under ERISA § 406. Also, the Ficklings argue that the Secretary should not be able to rely on § 3(14)(H) as to certain Fickling defendants because the Secretary referred to only § 3(14)(G),

[Footnote continued on next page]

Given our declaration that the Secretary's action may proceed, SCNB's third-party complaint seeking declaratory judgment in the *Knop* action and SCNB's separate declaratory judgment action are now resolved by this appeal. The court directs that judgment on the declaratory judgment issue be entered in favor of the Secretary.

For the above reasons, we REVERSE the district court's orders granting summary judgment and VACATE the final judgments entered in favor of the defendants SCNB and the Ficklings. The action is REMANDED for further proceedings consistent with this opinion.

[Footnote continued from previous page]

(E), and (F) as to those particular persons or entities. However, the Secretary's allegation, that the Ficklings are "parties in interest" under § 3(14) engaging in a transaction prohibited under § 406, was more than sufficient to put the Ficklings on notice of the Secretary's claims. Any failure to specify each and every sub-subsection of § 3(14) as to each and every person is immaterial.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

August 10, 1998

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 97-6058 Herman v. South Carolina Nat'l Bank
D.C. Docket No.: 92-02858 CV-L-NE

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate

Sincerely,

/s/ Thomas K. Kahn

THOMAS K. KAHN, Clerk

Reply To: Ola Solomon (404) 335-6178

The above letter also applies to the consolidated appeal, 97-6154.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[FILED-STAMPED AUG. 10, 1998]

No. 97-6058

D. C. Docket No. CV-92-2858-NE

ALEXIS HERMAN, Secretary of the United States Department of Labor,

Plaintiff-Appellant,

versus

SOUTH CAROLINA NATIONAL BANK; CHARTER MEDICAL CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN; WILLIAM A. FICKLING, JR.; BANK SOUTH OF MACON, Trustee under Agreement of William A. Fickling, Jr., Self-Employed Retirement Plan; NEVA L. FICKLING, et al.,

Defendants-Appellees.

No. 97-6154

D.C. Docket No. CV-91-L-1075-NE (lead case)

FRANCES J. KNOP;
MILLIE SMITH,

Plaintiffs,

versus

CHARTER MEDICAL CORPORATION, et al.,

Defendants,

SOUTH CAROLINA NATIONAL BANK,

Defendant-Cross-Claimant-Third Party Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.; J & R CAPITAL COMPANY, LTD.; W & J CAPITAL COMPANY, LTD.;

Defendants-Third Party Plaintiffs-Appellees,

STANLEY S. TROTMAN,

Defendant-Cross-Defendant,

J. RODNEY LAUGHLIN; JAMES D. DAHER,

Third Party Defendants,

NEVA L. FICKLING; WILLIAM A. FICKLING, III, et al.,

Movants-Third Party Plaintiffs-Appellees,

ALEXIS HERMAN, Secretary of the United States Department of Labor; DEPARTMENT OF LABOR,

Third Party Defendants-Appellants.

D.C. Docket No. CV-92-L-1544-NE

SOUTH CAROLINA NATIONAL BANK,

Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.; J & R CAPITAL COMPANY; W & J CAPITAL COMPANY, NEVA L. FICKLING, et al.,

Intervenor-Plaintiffs-Appellees,

versus

ALEXIS HERMAN, Secretary of the
United States Department of Labor,

Defendant-Appellant

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____F.2d____)

BEFORE: EDMONDSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

FRANCIS J. KNOP, et al., Plaintiffs.	)	
vs.	)	CIVIL ACTION
CHARTER MEDICAL CORPORATION, Defendant.	)	CV 91-L-1075-NE

SOUTH CAROLINA NATIONAL BANK, Plaintiff	)	
vs.	)	CIVIL ACTION
ROBERT REICH, Secretary of the United States Department of Labor, Defendant.	)	CV 92-L-1544-NE

ROBERT REICH, Secretary of the United States Department of Labor, Plaintiff,	)	CIVIL ACTION
vs.	)	
SOUTH CAROLINA NATIONAL BANK, et al., Defendants.	)	CV 92-L-2858-NE

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard on June 22, 1993, upon cross-motions for summary judgment filed by the parties. Upon consideration of the motions to dismiss or, in the alternative, for summary judgment, filed by defendants, William A. Fickling, Jr., W & J Capital Company, Ltd., J & R Capital Company, Ltd., Neva L. Fickling, William A. Fickling III, Jane F. Skinner, Julia C. Fickling, Roy H. Fickling, Claudia F. Fickling, Katherine M. Wright, Virginia M. Rabun, Bank South, Macon, as Trustee under Agreement of William A. Fickling, Jr., Self-Employed Retirement Plan, and NationsBank of Georgia, N.A. (formerly Citizens & Southern Trust Company (Georgia), N.A.) and William A. Fickling, Jr., as Trustee under certain agreement dated July 30, 1974 with William A. Fickling and Claudia F. Fickling (collectively "The Fickling defendants"), converted into a motion for summary judgment pursuant to the order entered on April 30, 1993, the evidentiary submissions in support thereof and in opposition thereto, the pleadings, and the arguments of counsel, it appears to the Court that there is no genuine issue of material fact and that the Fickling defendants are entitled to judgment as a matter of law. *Useden* v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), *cert. denied, Useden v. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel*, __ U.S. ___ , 1992 WL 127543 (June 7, 1993),

Accordingly, it is ORDERED, ADJUDGED and DECREED by the Court that the Fickling defendants' motion for summary judgment be and the same is hereby granted. Fed.R.Civ.P. 56.

The motion of the Fickling defendants having been granted, it is further ORDERED that the claims brought by the Secretary of Labor against the Fickling defendants be and the same are hereby dismissed with prejudice.

The Secretary of Labor's claims against the Fickling defendants having been dismissed, the Secretary's motion for leave to amend, filed with the Court on June 22, 1993, is, as counsel for the Secretary has indicated, moot. Nevertheless,

this Court overrules such motion as having been untimely filed.

The remaining motions for summary judgment are still under submission.

DONE this 25th day of June 1993.

/s/ Seybourn H. Lynne

SENIOR JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

FRANCIS J. KNOP and MILLIE SMITH,	)	
Plaintiffs,	)	
vs.	)	CV 91-L-1075-NE
CHARTER MEDICAL CORPORATION, et al.,	)	(CONSOLIDATED)
Defendants.	)	
SOUTH CAROLINA NATIONAL BANK,	)	
Third-party plaintiff,	)	
vs.	)	
JAMES D. DAHER, et al.,	)	
Third-party defendants.	)	
	)	
SOUTH CAROLINA NATIONAL BANK,	)	
Plaintiff,	)	
vs.	)	CV 92-L-1544-NE
ROBERT REICH, Secretary of Labor, U.S. Department of Labor,	)	(CONSOLIDATED)
Defendant.	)	
ROBERT REICH, Secretary of the United States Department of Labor,	)	
Plaintiff,	)	CV 92-L-2858-NE
vs.	)	(CONSOLIDATED)
SOUTH CAROLINA NATIONAL BANK,	)	

et al.,)
Defendants.)

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard upon cross-motions for summary judgment filed by the Secretary of Labor (the "Secretary") and filed by Wachovia Bank of South Carolina, N.A. (formerly known as South Carolina National Bank ("SCNB"). Upon consideration of SCNB's motion for partial summary judgment, the evidentiary submissions in support thereof and in opposition thereto, the pleadings, and the arguments of counsel, it appears to the court that there is no genuine issue of material fact and that SCNB is entitled to judgment as a matter of law as to the Secretary's claims for monetary relief. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. All claims of the Secretary of Labor for monetary relief against SCNB are hereby DISMISSED with prejudice, including without limitation all claims asserted under ERISA § 502(a)(2);

2. This Order does not adjudicate any of the Secretary's claims for non-monetary relief against SCNB under ERISA § 502(a)(5), or any of the Secretary's claims against any other party for any relief, monetary or non-monetary;

3. The Secretary's pending motion again seeking further discovery under Fed. R. Civ. P. 56(f) is hereby OVERRULED for the same reasons expressed in other orders of this court; and

4. The Secretary's pending motion seeking additional expert discovery is DENIED as untimely.

Done this 4th day of November 1996.

/s/ Seybourn H. Lynne
SENIOR JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

FRANCIS J. KNOP and MILLIE SMITH,	)	
Plaintiffs,	)	
vs.	)	CV 91-L-1075-NE
CHARTER MEDICAL CORPORATION, et al.,	)	(CONSOLIDATED)
Defendants.	)	
SOUTH CAROLINA NATIONAL BANK,	)	
Third-party plaintiff,	)	
vs.	)	
JAMES D. DAHER, et al.,	)	
Third-party defendants.	)	
SOUTH CAROLINA NATIONAL BANK,	)	
Plaintiff,	)	
vs.	)	CV 92-L-1544-NE
ROBERT REICH, Secretary of Labor, U.S. Department of Labor,	)	(CONSOLIDATED)
Defendant.	)	
ROBERT REICH, Secretary of the United States Department of Labor,	)	
Plaintiff,	)	CV 92-L-2858-NE
vs.	)	(CONSOLIDATED)

SOUTH CAROLINA NATIONAL BANK, et al.,)
Defendants.)

MEMORANDUM OPINION

South Carolina National Bank ("SCNB") has filed a motion for partial summary judgment as to the representative claims for monetary relief asserted by the Secretary of Labor ("Secretary"). This court concludes that the Secretary's representative claims for pecuniary relief are precluded under each of the three doctrines of laches, res judicata, and release.

I.

On May 10, 1991, two participants in the Charter Medical Corporation ("Charter") employee stock ownership plan ("ESOP") filed a complaint with this court on behalf of an alleged class of all participants in the ESOP. The participants claimed that various fiduciaries of the ESOP -- including Charter (the employer), William A. Fickling, Jr. (Charter's founder who sold stock to the ESOP), Interstate/Johnson Lane Corporation (the financial adviser hired to price the Charter stock purchased by the ESOP) and SCNB (the trustee of the ESOP) -- had violated ERISA by causing the ESOP to pay too much for the Charter stock purchased by the ESOP in 1990. On March 27, 1992, the participants signed an extensive settlement agreement with all the defendants. That same day, this court entered an order certifying a class that included all the ESOP participants. This court directed the parties to notify all the class members and the Secretary of the proposed settlement, and this court scheduled a hearing for April 30, 1992. At that hearing, this court received comments from individual participants, but the Secretary chose not to appear. This court entered an order approving the settlement agreement. The settlement included the following benefits to the ESOP and its participants and beneficiaries:

1) $30 million in loan forgiveness of the $70 million debt owed by the ESOP on the loan from the 1990 transaction;

2) $40 million in accelerated contributions (subject to certain conditions) by Charter to the ESOP in connection with the $70 million debt owed for the 1990 transaction;

3) a new retirement plan (the "New Plan") established by Charter under Internal Revenue Code § 401(k) as a subplan of the ESOP, permitting deferred compensation to eligible employees under § 401(k); and

4) over $12.3 million in contributions from Charter to the New Plan, and certain direct payments to be paid between July 1, 1992, and January 2, 1996.

Six weeks later, on June 19, 1992, the Secretary wrote SCNB and demanded that SCNB pay $80 million to the ESOP, rescind the 1990 transaction, and consent to further injunctive relief to bar SCNB from serving in the future as a fiduciary to any ERISA plan. SCNB responded by filing a complaint to enforce the class action settlement against the Secretary. Two weeks later, the Secretary filed suit in the United States District Court for the Middle District of Georgia, despite the fact that in the settlement order this court had retained continuing jurisdiction over all matters relating to the settlement. SCNB filed a motion to transfer the Georgia action to this court, and the motion was granted. This court subsequently consolidated the Secretary's action with the earlier class action and with SCNB's complaint against the secretary.

After an opportunity for discovery, SCNB filed a motion for partial summary judgment as to the Secretary's claims for monetary relief. Before a ruling was entered on said motion, the Secretary and SCNB by letter dated January 29, 1996, submitted a proposed statement of issues to be set for trial and a plan for additional discovery on those issue. In addition, in this letter, the Secretary and SCNB jointly

invited the court to explore with the parties the possibility of reaching an overall settlement of this litigation.

After the additional discovery, the court convened several settlement conferences as requested by the parties. The court emphasizes that at these conferences the attorneys operated in the highest tradition of civility. Despite the efforts of the court and the parties, no settlement was reached. As earlier indicated, now this court grants SCNB's motion for partial summary judgment as to the Secretary's representative claims for monetary relief on behalf of the Charter ESOP.

II.

In his First Amended Complaint, the Secretary alleges (1) that SCNB violated its fiduciary duties under ERISA § 404(a)(l), 29 U.S.C. § 1104(a)(1), when the ESOP acquired Charter common stock on February 15, 1990, and (2) that SCNB caused the ESOP to enter into a transaction prohibited by ERISA § 1106(a)(1), 29 U.S.C. § 1106(a)(1), by allowing the ESOP to pay more than "adequate consideration," as defined in ERISA § 3(18), 29 U.S.C. § 1002 (18), when the ESOP acquired Charter common stock on February 15, 1990. Accordingly, the Secretary's Complaint seeks to recover the same alleged losses on behalf of the same ESOP under the same section of ERISA and based on the same stock purchase as the participants sought and settled in the earlier class action.

The Secretary asserts claims for relief against SCNB pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) & (5). Secretary's First Amended Complaint ¶ 5. Section 502(a)(2) authorizes the Secretary to bring suit in a representative capacity on behalf of a plan against a fiduciary for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (explaining that Congress intended for § 502(a)(2) actions to "be brought in a representative capacity on behalf of the plan as a whole.") Section 502(a)(5) authorizes the Secretary to obtain injunctive relief and "other appropriate equitable relief" to

redress violations of certain ERISA provisions. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 260-61 (1993) (only equitable relief, not monetary damages, available under § 502(a)(5)).

III

Each of the three doctrines of laches, res judicata, and release separately precludes the Secretary's representative claims for pecuniary relief.

A. Laches

The doctrine of laches bars relief for those who delay in asserting their claims for an unreasonable time. *See EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199 (11th Cir. 1982) (holding that representative claims brought by the EEOC on behalf of private victims of discrimination can be barred by laches). As in *Dresser*, here the Secretary is making a representative claim for monetary relief on behalf of private persons. *See Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1100 (7th Cir. 1992) (Posner, J., concurring) ("[Suits by the EEOC] are the same kind of suit as this; they are suits on behalf of private individuals in which any damages collected in the suit are paid over to the individuals rather than retained by the agency."). Thus, in order for laches to apply, this court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced the defendant. *Dresser*, 668 F.2d at 1202.

The Secretary concedes that he received all of the information and documents upon which his present claims are based long before the class action settlement fairness hearing, that his hired expert had explained the alleged deficiencies in the 1990 transaction more than a month before that hearing, and that he received a full set of the settlement documents a month in advance of their approval by this court. (Aff. of Messina ¶ 12; Aff. of Beaver ¶¶ 9, 11; Aff. of Schloss ¶¶ 12-13, 17). By that time, the Secretary had been investigating the Charter ESOP for two full years and had reviewed and been given the opportunity to review

and copy every contemporaneous document SCNB had referable to the 1990 transaction.

Despite this notice, the Secretary chose not to appear at the April 30, 1992, hearing nor to advise the parties or this court of the Secretary's opinion that additional monetary relief for the class action plaintiffs was warranted. Instead, in his April 9, 1992, letter to the parties, the Secretary stated that he was not a party to the settlement agreement and thus did not consider himself bound by its terms. The Secretary added, however, that he did not wish to make the chances of "settling" the action any less likely.

The Secretary's having intentionally waived every opportunity to appear or to advise the court and parties of his opinions, the court and parties were led to reasonably rely on his waiver as allowing the settlement to resolve finally all claims that might be brought on behalf of the ESOP. Accordingly, based in no small part on the reticence of the Secretary to express any substantive dissatisfaction with the settlement, this court approved the settlement agreement.

Included in the settlement was SCNB's release of all other persons from liability in this matter. The failure of the Secretary to express his dissatisfaction with the class action settlement agreement caused SCNB to continue to agree to and proceed to final judgment with the settlement, and thus to be bound by a release of other persons. These other persons include Mr. Fickling, who received proceeds from the ESOP for his Charter stock, and Interstate/Johnson Lane Corporation, who set the allegedly excessive price for Charter stock. SCNB never would have continued to support the settlement if it had known of the Secretary's imminent plans to proceed against SCNB in an alternate forum. Therefore, the Secretary's inexcusable delay unduly prejudiced SCNB. Thus, these undisputed facts are all that are needed to establish the defense of laches.

B. Res Judicata

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised

in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir. 1992). The doctrine of res judicata applies where there is (1) a final judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) with the same cause of action presented in both suits; and (4) with substantial identity of parties. *Manning*, 953 F.2d at 1358. In this case, all four requirements are met, and thus res judicata applies.

First, a final judgment exists, because a consent decree or a settlement has the same preclusive effect as a judgment. *See Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991). Second, there is no dispute that this court had jurisdiction to resolve the claims asserted in the class action.

Third, the same cause of action is presented in both suits. The claims by the participants and the claims by the Secretary both allege that SCNB violated ERISA in connection with the 1990 stock purchase made on behalf of the ESOP. Further, the Secretary's § 502(a)(2) claim for pecuniary relief under ERISA § 409 is the same claim as the participants' § 502(a)(2) claim under ERISA § 409 for pecuniary relief, which was settled in the class action.

Fourth, there is substantial identity of the parties. As conceded at oral argument, the Secretary's sole basis for claiming monetary relief for the ESOP from SCNB is under ERISA § 502(a)(2). (Transcript, June 22, 1993, pp. 41-46; *see* First Amended Complaint, p. 10, ¶ 3 (only seeking restitution from defendants other than SCNB)). In the class action, the participants already recovered pecuniary relief for the ESOP under § 502(a)(2). As the Supreme Court has explained, § 502(a)(2) claims are brought in a representative capacity only. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). A plan, such as the Charter ESOP, has substantial identity with itself, regardless of whether its § 502(a)(2) representative is the Secretary or was participants. *See Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611, 619 (1926) (holding that the government "ought not be permitted to renew the controversy

in the name of a merely nominal plaintiff, and thereby avoid the effect of former adjudication"). Thus, res judicata applies to preclude the Secretary's claims for monetary relief.[1]

C. Release

A release bars relitigation of those claims encompassed by the release by or on behalf of those persons covered by the release. *See United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The class action settlement included a release of all claims for relief on behalf of the Charter ESOP and its participants and beneficiaries. In making a claim for

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1. To be sure, different considerations might normally apply to the Secretary's claims for appropriate equitable relief under ERISA § 502(a)(5). The Secretary alone is authorized to sue under that section. Equitable relief barring a fiduciary from taking certain actions in the future arguably can serve to vindicate a broader public interest in preventing violations of the law. *See Donovan v. Cunningham*, 716 F.2d 1455, 1461-62 & n.10 (5th Cir. 1983) (noting that a prior private settlement might not bar Secretary's claim for equitable relief), *cert. denied*, 467 U.S. 1251 (1984); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691-92 & n.12 (7th Cir. 1986) (en banc) (same). As such, the doctrine of res judicata might not preclude the Secretary's separate claims for appropriate equitable relief under ERISA § 502(a)(5). *See Brink v. DaLesio*, 88 F.R.D. 610, 613 (D.Md. 1980) (Secretary's tardy intervention in private participant's ERISA action denied, but denial "does not prevent the Secretary from filing an independent action to protect *any interests that have not been adjudicated in the present action*") (emphasis added), *modified in part on other grounds*, 667 F.2d 420 (4th Cir. 1981). This court is not now deciding whether whether such claims should or should not be nonetheless barred under the unique circumstances presented by this case.

monetary relief, the Secretary is attempting to bestow a pecuniary windfall upon the ESOP and thus the participants and beneficiaries of the ESOP. Because the ESOP and its participants and beneficiaries have already released any further claim for monetary relief, subsequent pecuniary relief is barred.

IV.

ERISA § 502(h), 29 U.S.C. § 1132(h), provides that the Secretary shall receive a copy of any complaint brought under ERISA (other than one for benefits owed), and that the Secretary shall then have the right to intervene. If the Secretary chooses not to intervene in the pending action, the Secretary knowingly risks the principles of laches, res judicata, and release precluding him from seeking the same relief in a later action. Indeed, the logical purposes for the Congressional grant of the Secretary's statutory right of intervention would be avoiding inappropriate preclusion of the Secretary by private parties and avoiding relitigation of the same claims for relief in two separate lawsuits.

In this case, not only was the Secretary provided a copy of the complaint, but he also knew that all affected ESOP participants and beneficiaries had chosen to settle for themselves all claims for monetary relief for their benefit; that this court was carefully scrutinizing a comprehensive class action settlement to ensure that the interests of all affected plan participants and beneficiaries were duly taken into account, and that each and every affected participant and beneficiary had received actual notice of the proposed settlement and an opportunity to object to it. Worse, the Secretary admittedly received advance notice of the settlement documents and fairness hearing at a time when the Secretary had in his possession not only his expert's present opinion, but the documents upon which that opinion and the Secretary's present claims for monetary relief are based. Despite all of this, the Secretary artfully remained silent rather than question the sufficiency, adequacy or fairness of the class action settlement before it was approved by the court; made no objection to the express release by SCNB, by

the ESOP, and by the class of participants and beneficiaries of all claims for additional damages or other relief on their behalf; and took no action to advise the court or the parties of his position that additional monetary relief to the Charter ESOP and thus the class members was warranted. Instead, the Secretary deliberately avoided the statutory right of intervention that Congress has granted him, because he wanted to bring a second lawsuit seeking the same relief in another forum a few weeks after the settlement was approved.

In granting the motion to transfer the Secretary's claim from Georgia, Judge Fitzpatrick observed:

> [I]f potential plaintiffs, plaintiffs who are represented by competent counsel and have a class certified and it is litigated -- or at least negotiated -- to a settlement approved by a United States District Court, that ought to end the matter, [and] the government should not be allowed to come in [afterward] merely because it feels the settlement was wrong or too low . . .

(Transcript of October 26, 1992, Hearing, pp. 39-42).

Congress conferred upon the Secretary the right to intervene. In an action affecting an ERISA plan and its beneficiaries, this court is charged with the responsibility of determining the consequences of the Secretary's deliberate and calculated refusal to exercise his right to intervene herein. This court believes that under the totality of the undisputed facts, the Secretary should be precluded as a matter of law and of equity from asserting a second claim seeking identical pecuniary relief.

Done this the 4th day of November 1996.

/s/ Seybourn H. Lynne
SENIOR JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

FRANCES J. KNOP and MILLIE SMITH,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. CV-91-L-1075 NE
CHARTER MEDICAL CORPORATION, SOUTH CAROLINA NATIONAL BANK, WILLIAM A. FICKLING, JR., STANLEY S. TROTMAN, CHARTER RETREAT HOSPITAL, INC., CHARTER MEDICAL CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN, INTERSTATE/JOHNSON LANE SECURITIES CORPORATION, J & R CAPITAL COMPANY, LTD., W & J CAPITAL COMPANY, LTD., BANKERS TRUST COMPANY,	)	
Defendants,	)	
SOUTH CAROLINA NATIONAL BANK,	)	

Third-Party Plaintiff,)
)
)
vs.)
)
)
JAMES D. DAHER,)
)
Third-Party Defendant.)

ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on April 30, 1992, pursuant to this Court's Order of March 27, 1992, upon whether the Court should approve as fair, adequate and reasonable a settlement of this action upon the terms and conditions of the attached Stipulation and Agreement of Compromise and Settlement dated March 27, 1992 and executed by all parties ("Stipulation of Settlement"); it appearing that due notice of said Settlement Hearing was given in accordance with the terms of the aforesaid Order; the Court having determined that notice to the Class, as described in the aforesaid Order, was the best practicable notice under the circumstances, and fully complies with all requirements of Due Process, Federal Rule of Civil Procedure ("F.R.C.P.") 23 and F.R.C.P. 23.1; the respective parties having appeared by their attorneys of record; the Court having received and considered arguments and evidence in connection with the proposed compromise and settlement of the action; the attorneys for the respective parties having been heard; an opportunity to be heard having been given to all of the persons requesting to be heard in accordance with the aforesaid Order: and the proposed settlement having been heard and considered by the Court;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. For purposes of considering, approving and effectuating the settlement of the parties and to fairly and adequately protect the interests of the Charter Medical Corporation Employee Stock Ownership Plan (the "ESOP")

and the members of the Class, this Court has previously ordered (and hereby confirms) that this action is to be maintained as both a derivative action on behalf of the ESOP pursuant to F.R.C.P. 23.1 and as a class action pursuant to F.R.C.P. 23(b)(1)(B) and 23(b)(2), for a plaintiff Class consisting of all present participants and beneficiaries under the ESOP and all former participants and beneficiaries under the ESOP who had earned a vested right to amounts allocated to their ESOP accounts prior to termination of employment, and each of their representatives, assigns, heirs, executors, administrators, custodians, predecessors or successors in interest (other than defendants and members of their immediate families) (the "Class"). The Court has heretofore found that the Named Plaintiffs are adequate representatives of the Class and that all requirements of F.R.C.P. 23.1, 23(a), 23(b)(1)(B), and 23(b)(2) are met, and the Court hereby reaffirms that finding. The Court expressly finds that the Class is so numerous that joinder or all members is impracticable, that there are questions of law and fact common to the Class, that the claims of the Named Plaintiffs are typical of the claims of the Class, and that the representative parties have fairly and adequately protected the interests of the Class and will continue to do so. The Court further finds that prosecution of separate actions by individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other Class members, and would substantially impair or impede their ability to protect their interests. The Court further finds that defendants have acted on grounds generally applicable to the Class, thereby making appropriate final equitable relief with respect to the Class as a whole. The Court further finds that the nature of the interests of the Class members as participants in the ESOP make this action inappropriate for certification under F.R.C.P. 23(b)(3).

2. The Court hereby finds that the settlement of the claims asserted on behalf of the ESOP and on behalf of the Class in this action, upon all of the terms of the Stipulation of Settlement dated and filed March 27, 1992, including

without limitation, the releases between the parties, is fair, reasonable and adequate, and the Stipulation of Settlement and all terms and provision thereof are hereby incorporated herein and made a part of this Order and are APPROVED.

3. This action and all claims asserted therein are DISMISSED in their entirety on the merits, with prejudice, and without taxable costs to any party; all complaints filed in this action, including Named Plaintiffs' Amended and Restated Complaint and the Third-Party Complaint of Defendant South Carolina National Bank and Cross-Claim of South Carolina National Bank against Defendant Stanley S. Trotman, are DISMISSED in their entirety on the merits, with prejudice, and without taxable costs to any party; and all Defendants and the Third-Party Defendant are hereby released and discharged with respect to all claims, cross-claims, third-party claims, causes, matters and issues which are Released Claims as defined in the Stipulation Settlement.

4. Named Plaintiffs, all members of the Class, the Third-Party Plaintiff, Defendants, the Third-Party Defendant and each of their respective heirs, executors, administrators, personal representatives, attorneys, successors and assigns, and each of their respective parents, subsidiaries, affiliates, officers, employees, directors, agents and attorneys, are hereby permanently barred and enjoined from initiating, asserting, maintaining or continuing any action in any court asserting any of the claims dismissed herein or any of the Released Claims as defined in the Stipulation of Settlement.

5. The provisions of this Order and Final Judgment are subject to, and contingent upon, the confirmation by the Bankruptcy Court no later than June 30, 1993, of the proposed Plan of Reorganization of Charter, as outlined in the preliminary Information Statement/Prospectus dated February 19, 1992, as the same may be subsequently amended consistent with the terms of the Stipulation of Settlement.

6. There being no reason for delay, the Clerk of Court is hereby directed, pursuant to F.R.C.P. 54(b), to ENTER this Order as a Final Judgment.

7. Plaintiffs' counsel are jointly AWARDED $1,800,000 in full payment of all attorneys' fees and expenses incurred in this Action, which will be paid by defendant Charter Medical Corporation ("Charter") in accordance with the terms of the Stipulation of Settlement.

8. Charter shall provide the benefits to Class members set forth in the approved Stipulation of Settlement.

9. This Final Judgment approving and incorporating the Stipulation of Settlement entered among the parties is entered in the expectation that the Plan of Reorganization (as described in paragraph 5 of this Final Judgment) will be confirmed by the Bankruptcy Court no later than June 30, 1993. If the Plan of Reorganization is not confirmed by the Bankruptcy Court on or before June 30, 1993, this Final Judgment shall be deemed to have been entered on the mistaken assumption that the Plan of Reorganization would be so confirmed, which shall in that event be a ground for relief from this Final Judgment pursuant to Rule 60(b)(1), and shall also constitute a ground for relief under Rule 60(b)(6). Continuing jurisdiction over all matters relating to the consummation of the Settlement, construction and enforcement of the Stipulation of Settlement, the entry and enforcement of this Final Judgment, and any award of attorneys' fees and expenses, is reserved in this Court.

Dated: April 30, 1992

/s/ Seybourn H. Lynne

Seybourn H. Lynne

Senior United States District Judge

APPROVED AS TO FORM:

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APPENDIX G

U.S. Department of Labor [SEAL]
April 9, 1992

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Re: Investigation of Charter Medical Corporation Employee Stock Ownership Plan (the "ESOP")

Dear Sirs:

We are in receipt of a copy of the fully executed settlement documents entered into by the parties to *Knop v. Charter Medical Corporation, et al.*, Civil Action File No. CV-91-L-1075-NE (the "*Knop Action*") and so ordered by Judge Lynne on March 27, 1992. We have also been informed that the parties to the *Knop Action* may have the understanding that the Secretary can, may, or will be bound in some way by the terms of any settlement entered into in the *Knop Action*. Such an understanding is unfounded.

The Secretary was not a party to the settlement and will not be bound by any part of the settlement; in fact, the Secretary is continuing her investigation of the Charter Medical Corporation Employee Stock Ownership Plan (the "ESOP") regarding possible violations of the Employee Retirement Income Security Act of 1974.

In the event the Department concludes that ERISA violations occurred, you should be aware that we will take whatever enforcement action, including litigation, which we deem to be appropriate. While we do not wish to make the chances of settling the *Knop Action* any less likely, we feel that it would be disingenuous to allow it to go forward without making the above clear to the parties to such settlement.

If you have any questions or comments, you may direct them to Michael Schloss, Trial Attorney, U.S. Department of Labor, Plan Benefits Security Division, P.O. Box 1914, Washington, D.C., 20013, telephone (202) 523-6928.

Sincerely,

/s/ Charles Lerner

Charles Lerner
Director of Enforcement

APPENDIX H

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* provides in pertinent part:

§ 1002. Definitions

For purposes of this subchapter:

* * *

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

* * *

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national

securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

Part 4—Fiduciary Responsibility

§ 1101. Coverage

(a) Scope of coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than—

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) Securities or policies deemed to be included in plan assets

For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall

be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

(c) Clarification of application of ERISA to insurance company general accounts

(1)(A) Not later than June 30, 1997, the Secretary shall issue proposed regulations to provide guidance for the purpose of determining, in cases where an insurer issues 1 or more policies to or for the benefit of an employee benefit plan (and such policies are supported by assets of such insurer's general account), which assets held by the insurer (other than plan assets held in its separate accounts) constitute assets of the plan for purposes of this part and section 4975 of Title 26 and to provide guidance with respect to the application of this subchapter to the general account assets of insurers.

(B) The proposed regulations under subparagraph (A) shall be subject to public notice and comment until September 30, 1997.

(C) The Secretary shall issue final regulations providing the guidance described in subparagraph (A) not later than December 31, 1997.

(D) Such regulations shall only apply with respect to policies which are issued by an insurer on or before December 31, 1998, to or for the benefit of an employee benefit plan which is supported by assets of such insurer's general account. With respect to policies issued on or before December 31, 1998, such regulations shall take effect at the

end of the 18-month period following the date on which such regulations become final.

(2) The Secretary shall ensure that the regulations issued under paragraph (1)—

(A) are administratively feasible, and

(B) protect the interests and rights of the plan and of its participants and beneficiaries (including meeting the requirements of paragraph (3)).

(3) The regulations prescribed by the Secretary pursuant to paragraph (1) shall require, in connection with any policy issued by an insurer to or for the benefit of an employee benefit plan to the extent that the policy is not a guaranteed benefit policy (as defined in subsection (b)(2)(B) of this section)—

(A) that a plan fiduciary totally independent of the insurer authorize the purchase of such policy (unless such purchase is a transaction exempt under section 1108(b)(5) of this title),

(B) that the insurer describe (in such form and manner as shall be prescribed in such regulations), in annual reports an din policies issued to the policyholder after the date on which such regulations are issued in final form pursuant to paragraph (1)(C)—

(i) a description of the method by which any income and expenses of the insurer's general account are allocated to the policy during the term of the policy and upon the termination of the policy, and

(ii) for each report, the actual return to the plan under the policy and such other financial information as the Secretary may deem appropriate for the period covered by each such annual report,

(C) that the insurer disclose to the plan fiduciary the extent to which alternative arrangements supported by assets of separate accounts of the insurer (which generally hold plan assets) are available, whether there is a right under the policy to transfer funds to a separate account and

the terms governing any such right, and the extent to which support by assets of the insurer's general account and support by assets of separate accounts of the insurer might pose differing risks to the plan, and

(D) that the insurer manage those assets of the insurer which are assets of such insurer's general account (irrespective of whether any such assets are plan assets) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, taking into account all obligations supported by such enterprise.

(4) Compliance by the insurer with all requirements of the regulations issued by the Secretary pursuant to paragraph (1) shall be deemed compliance by such insurer with sections 1104, 1106, and 1107 of this title with respect to those assets of the insurer's general account which support a policy described in paragraph (3).

(5)(A) Subject to subparagraph (B), any regulations issued under paragraph (1) shall not take effect before the date on which such regulations become final.

(B) No person shall be subject to liability under this part or section 4975 of Title 26 for conduct which occurred before the date which is 18 months following the date described in subparagraph (A) on the basis of a claim that the assets of an insurer (other than plan assets held in a separate account) constitute assets of the plan, except—

(i) as otherwise provided by the Secretary in regulations intended to prevent avoidance of the regulations issued under paragraph (1), or

(ii) as provided in an action brought by the Secretary pursuant to paragraph (2) or (5) of section 1132(a) of this title for a breach of fiduciary responsibilities which would also constitute a violation of Federal or State criminal law.

The Secretary shall bring a cause of action described in clause (ii) if a participant, beneficiary, or fiduciary

demonstrates to the satisfaction of the Secretary that a breach described in clause (ii) has occurred.

(6) Nothing in this subsection shall preclude the application of any Federal criminal law.

(7) For purposes of this subsection, the term "policy" includes a contract.

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator)

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(A) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of Title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees,. former employees or their beneficiaries, proposes through an unfunded arrangement to compensate

retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1995) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter-

> **(i)** if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and
>
> **(ii)** if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of Title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1)

shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of Title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(4) Redesignated (3)

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in

his account (as determined under regulations of the Secretary)—

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or

omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act or such trustee.

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage of similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

* * *

§ 1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26), in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums

or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of an ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a

pooled investment fund of an insurance company qualified to do business in a State, if-

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on January 1, 1995).

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees

(1) Section 1107(b) of this title and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who in with respect to the plan an owner-employee (as defined in section 401(c)(3) of Title 26), a member of the family (as defined in section 267(c)(4) of Title 26) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2)(A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of Title 26).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of Title 26.

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 1107(d)(6) of this title) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of Title 26) of any such ownership-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of Title 26) who owns (or is considered as owning within the meaning of section 318(a)(1) of Title 26) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

Section 1106(b)(2) of this title shall not apply to any merger or transfer described in subsection (b)(11) of this section.

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall

be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

Part 5—Administration and Enforcement

§ 1131. Criminal penalties

Any person who wilifully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * * *

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary

(except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975 (1990), added by § 2003(a) of ERISA, *see* 88 Stat. 971, provides:

§ 4975. Tax on prohibited transactions

(a) Initial taxes on disqualified person.--There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 5 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person.--In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction.--

(1) General rule.--For purposes of this section, the term "prohibited transaction" means any direct or indirect--

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of

a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) Special exemption.--The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only alter consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is--

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for

exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

(3) Special rule for individual retirement accounts.-- An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt for [FN1MV] the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

(d) Exemptions.--The prohibitions provided in subsection (c) shall not apply to--

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan--

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to an [FN2MV] leveraged employee stock ownership plan (as defined in subsection (e)(7)), if--

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service--

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if--

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction);

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph

shall not apply with respect to the application of subsection (c)(1)(E) or (F); or

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F).

The exemptions provided by this subsection (other than paragraphs (9) and (12)) shall not apply to any transaction with respect to a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)) in which a plan directly or indirectly lends any part of the corpus or income of the plan to, pays any compensation for personal services rendered to the plan to, or acquires for the plan any property from or sells any property to, any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of the preceding sentence, a shareholder-employee (as defined in section 1379, as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982), a participant or beneficiary of an individual retirement account or an individual retirement annuity (as defined in section 408), and an employer or association of employees which establishes such an account or annuity under section 408(c) shall be deemed to be an owner-employee.

(e) Definitions.--

(1) Plan.--For purposes of this section, the term "plan" means a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a), an individual

retirement account described in section 408(a) or an individual retirement annuity described in section 408(b) (or a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be such a trust, plan, or account).

(2) Disqualified person.--For purposes of this section, the term "disqualified person means a person who is--

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of --

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of-

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) Fiduciary.--For purposes of this section, the term "fiduciary" means any person who--

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

(4) Stockholdings.--For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) Partnerships; trusts.--For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) Member of family.--For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) Employee stock ownership plan.--The term "employee stock ownership plan" means a defined contribution plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, if applicable, section 409(n) and, if the employer has a registration-type class of securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

(8) Qualifying employer security.--The term "qualifying employer security" means any employer security within the meaning of section 409(1). If any moneys or other property

of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) Section made applicable to withdrawal liability payment funds.--For purposes of this section--

(A) In general.--The term "plan" includes a trust described in section 501(c)(22).

(B) Disqualified person.--In the case of any trust to which this section applies by reason of subparagraph (A), the term "disqualified person" includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

(f) Other definitions and special rules.--For purposes of this section--

(1) Joint and several liability.--If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) Taxable period.--The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of--

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) Sale or exchange; encumbered property.--A transfer of real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) Amount involved.--The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value--

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) Correction.--The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(g) Application of section.--This section shall not apply--

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or

(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) **Notification of Secretary of Labor.**--Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar

procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.